THE NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

1925.

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The Right Hon. James Andrews.

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The Hon. Daniel Martin Wilson.

King's Bench Division.

The Right Hon. Sir Denis Stanislaus Henry, Baronet,

The Right Hon. Thomas Walters Brown.

Attorney General.

The Right Hon. Richard Best., K.C.

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND.

Appeal.
1924

Nov. 6

PATRICK O'KANE, Appellant;

JAMES MULLAN, Respondent (1).

Power of Attorney Executed Abroad—Office Copy—Sufficient Evidence of Contents—Evidence of Execution—Identity of Donor—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), Sect. 48, Sub-sects, (1) and (4).

P. M. died intestate and unmarried, and letters of administration were granted to the defendant J. M., a cousin of the deceased. P. M. had five brothers and three sisters, one, M. J. M., married Joseph M'L., and had eight children, including one called James M'L. James M'L. went to America with his father and mother between 38 and 50 years ago. Proceedings were instituted by the plaintiff as donee of a power of attorney executed by James M'L. to have the grant of administration revoked on the ground that he was nearer of kin than the defendant to the deceased.

An office copy of the power of attorney purporting to have been executed by James M'L was put in evidence on behalf of the plaintiff,

(1) In the Court of Appeal before Moore L.J. and Andrews L.J.

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Brown J.

Held by the Court of Appeal that section 48 sub-s. 4 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41) merely obviates the necessity for production of an original instrument by enacting that an office copy of an instrument deposited as therein provided shall without further proof be sufficient evidence of its contents, and that the section does not make such copy evidence either of the truth of the contents or of the identity of the person by whom the original was made.

CASE STATED for the opinion of His Majesty's Court of Appeal in Northern Ireland by Brown J., at the City of Londonderry Summer Assizes, 1924, on the hearing of an appeal from a dismiss by the Recorder of Londonderry of a testamentary civil bill brought by the plaintiff Patrick O'Kane, against the defendant, James Mullan.

The civil bill was brought to revoke a grant of letters of administration (intestate) dated 10th September, 1921, granted to defendant in the goods of Patrick Mullan, late of Bolie, Greysteel, in the County of Londonderry, who died on the 22nd July, 1921, intestate.

The question arose as to the identity of Patrick O'Kane, who presumably would be entitled to a grant of administration in priority to the defendant. James M'Loughlin went to America on some date between 38 and 50 years ago, and was then aged about 15 or 16 years.

A power of attorney, dated the 26th day of October, 1921, purporting to be executed by James M'Loughlin, therein described as James M'Loughlin, of the County of Philadelphia, State of Pennsylvania, United States of America, was filed in the proper Office of the King's Bench Division in Northern Ireland on the 5th day of May, 1922, pursuant to Section 48 of the Conveyancing and Law of Property Act, 1881. Under this power of attorney Patrick O'Kane, the plaintiff, was appointed as lawful attorney of the said James M'Loughlin. At the hearing an office copy of the said power of attorney was offered in evidence on behalf of the plaintiff.

Counsel for the defendant objected that there was no evidence that the James M'Loughlin who executed the original was the James M'Loughlin who was entitled as one of the next-of-kin of the deceased.

Counsel for the plaintiff urged that under Section 48 of the Conveyancing and Law of Property Act, 1881 (44 &

45 Vict. c. 41), the office copy of the power of attorney was sufficient evidence of the contents of the instrument.

The Recorder refused to act on this contention and dismissed the suit without prejudice.

The plaintiff appealed, and the appeal was heard before Brown J. at the City of Londonderry Assizes in July, 1924.

The questions for the decision of the Court were :—

1. Is the certified office copy of said power of attorney filed in accordance with the provisions of Section 48 of the Conveyancing and Law of Property Act, 1881, without further proof, sufficient evidence of the contents of said power of attorney; and, 2. Is the verification thereof as required by said section sufficient evidence of the execution thereof by, and of the identity of the said James M'Loughlin who executed it, without further proof by plaintiff.

Babington K.C. and *M'Coy* for the plaintiff and appellant :—

A dispute arose as to identity of the man who executed the power of attorney. We submit that a power of attorney is at least prima facie evidence of the facts therein contained. It is enough for us to satisfy the Court that sufficient and prima facie evidence are the same. We rely on Sub-s. 4 of Section 48 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41) and contend that verification by a British Vice-Consul is sufficient proof of actual execution.

[ANDREWS L.J. The question whether the words "sufficient evidence" which occur also in the Courts (Emergency Powers) Act, 1917, mean "prima facie" or "conclusive" evidence was carefully considered by Molony C.J. in the case of *Muller Staub Fils* v. *M'Bride and Williams, Limited*, in the High Court of Appeal for Ireland. In his judgment Molony C.J. reviews the relevant authorities. (1)]

Babington K.C. What more could we do? These powers of attorney executed abroad are acted upon every day, and we submit that no affidavit is necessary. Rules

(1) See this judgment reported in note page 7 post

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Brown J.

of the Supreme Court Ireland, O. 38, r. 5 (Wylie p. 575). We have been unable to find any modern authorities dealing with the point, but there are two older cases, *Ex parte Myers* (1) and *Ex parte Wilkinson* (2).

We submit that the expression "verified" must imply that the man who describes himself in the instrument executed the document, and that we are entitled to succeed unless the defendant is able to show either that there is no such man or that the power of attorney was not executed by him. The presumption is in favour of the authenticity of the document. The learned Recorder should have received the office copy of the power of attorney and acted upon it.

If the onus is on the plaintiff, no instrument of this description can ever be proved, and verification by the British Vice-Consul is worthless. We are entitled to act on this document until it is displaced or shown to be a forgery, and we contend that the authentication covers not only the signature, but the contents. "Verification" means verification of proper execution.

E. S. Murphy K.C. (with him *McGuckin*) for defendant and respondent:—

Here it is sought to revoke letters of administration already granted. Is this office copy prima facie evidence or evidence at all of the statement with which it opens? We adopt the passage in a note in Hood and Challis's Conveyancing (7th edition) p. 141 as containing the law on the subject. If the original document itself would not be evidence of the facts therein stated, how can an office copy be made evidence of them? We submit that an office copy does not prove any statement contained in the original document. We can cite no authority that would be of assistance. *Ex parte Myers* (1) and *Ex parte Wilkinson* (2) are merely authorities as to the proper mode of authentication. As to authentication, see Wharton's Law Lexicon (11th edition).

It is going very far to suggest that the document is any evidence that the man described in it is the James M'Loughlin who left this country between 38 and 50 years ago. The document is only proved to be executed by a man who called himself James M'Loughlin.

(1) 2 Deac. & C. 406. (2) 2 Deac. & C. 585.

If the contention urged on behalf of the plaintiff is right then a power of attorney will always solve all difficulties.

The office copy was rightly rejected by Brown J.

MOORE L.J. [Having stated the facts proceeded] It is plain that the plaintiff, Patrick O'Kane, has no right, title or claim to sue as such in the present case unless as the lawful attorney of the nephew of the deceased, who was known as James M'Loughlin, and who went to America some thirty-five or forty years ago.

To prove this he metaphorically throws down an office copy of a power of attorney, filed in the proper office, purporting to be executed by a James M'Loughlin, of Philadelphia, County of Philadelphia, State of Pennsylvania, United States of America, as donor of the power.

The original is not produced, and the execution of it by the James M'Loughlin, the real plaintiff, is not proved. The defendant says this is not enough: that there is no evidence, notwithstanding its purport if admitted, that the instrument was ever executed by the person whom I may call the real James M'Loughlin. In answer to this the plaintiff relies on Sec. 48 (1) and (4) of the Conveyancing and Law of Property Act, 1881. Under Sub-sec. (1) a power of attorney "its execution being verified by "affidavit, statutory declaration, or other sufficient "evidence" may be deposited in the Central Office, &c.

By Sub-sec. 4 "an office copy of an instrument so "deposited shall without further proof be sufficient "evidence of the contents of the instrument, &c."

In my opinion this does not carry the plaintiff any farther. There is a wide distinction between verifying the execution of an instrument, which is all that is required by Sub-sec. (1), and verifying the statements in an instrument, which is what the plaintiff asks us to hold has been done here. Nor does Sub-sec. 4 assist him. At first I thought something might turn on the expression "shall be sufficient evidence," as in the case to which my brother Andrews L.J. has referred (1), but on examination of the sub-section it is plain that there is nothing in this. The sub-section is intended to save the necessity

(1) Muller Staub Fils v. M'Bride and Williams, post p. 7.

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Moore L.J.

for production of the original instrument filed in the proper office by substituting for it as evidence an office copy. But it could never have been contended that the Act gave such a copy for purposes of evidence a higher value than the original. The sub-section only means that the office copy is sufficient evidence that its contents are those of the original, but not that its contents are true. It all comes back to the difference between verifying the execution of the instrument, and verifying its contents.

For these reasons we answer the first question in the affirmative and the second in the negative.

ANDREWS L.J. I entirely agree with the judgment that has been delivered by Lord Justice Moore.

I wish to make it clear that our decision involves no such conclusion as was suggested by counsel for the plaintiff—that powers of attorney executed abroad are necessarily useless. This power of attorney might have been made effective, had it been supplemented by other requisite and appropriate evidence.

Section 48 (4) of the Conveyancing and Law of Property Act, 1881, does not in my opinion assist the plaintiff's case. I entirely approve of and adopt the passage quoted by Mr. Murphy from Hood and Challis's Conveyancing (7th edition), p. 141, as to the legal effect of this sub-section. "The deposit of a document purporting to be a power of attorney at the Central Office, of course, gives it no validity or authenticity which it would not otherwise have had; and office copies will only prove (1) the fact that a certain document was deposited; (2) the fact that it contained such and such matters."

It is contended that our decision will cause great hardship to the plaintiff. If so, the responsibility rests entirely with himself, for there was no surprise in this case. The civil bill was issued in 1922, and was not finally disposed of until 1924, so there was ample opportunity for him to produce the requisite further

evidence. Instead of doing so he relied upon what he erroneously conceived to be his strict legal rights.

Accordingly we affirm the dismiss, with £15 15s. costs to the defendant.

Solicitor for the plaintiff and appellant: *William J. G. Seeds.*

Solicitor for the defendant and respondent: *T. E. Conaghan.*

J. MCC.

IN THE HIGH COURT OF JUSTICE IN IRELAND.

KING'S BENCH DIVISION.

1919. No. 6559.

MULLER STAUB FILS, Plaintiffs;

M'BRIDE AND WILLIAMS, Defendants.

At the trial on 14th August, 1921, at the Belfast Assizes, before Mr. Justice Moore, without a jury, the defendants offered in evidence a certificate of the War Trade Intelligence Department, dated 28th October, 1918, to the following effect that "in the "month of June, 1916, the Department, with the object of pre- "venting transactions which in the opinion of the Department "would or might be contrary to national interests, advised "Messrs. M'Bride & Williams not to do business with the firm "of Muller Staub Fils."

The certificate was given pursuant to Sec. 3 of 7th and 8th Geo. V., c. 25 Courts (Emergency Powers) Act, 1917. By the Section such certificate "shall be sufficient evidence that such "direction or advice was issued or given and with such object "as aforesaid." The defendants argued that this was equivalent to "conclusive evidence," and no evidence contra to the state- ments in the certificate could be received.

Moore J. over-ruled this contention, and received such evidence, and, finding such advice was not in fact given, eventually entered judgment for the plaintiffs.

This judgment was reversed by the Court of Appeal in Southern Ireland on 29th November, 1921, and this decision was affirmed by the High Court of Appeal in Ireland on 30th March, 1922, but the judgment was restored by the House of Lords, who did not, however, deal with the argument above set out.

The judgment of Molony, C.J., in the High Court of Appeal, as reported by Mr. C. Lehane, Barrister-at-Law, was as follows:—

"MOLONY C.J. By twenty-four contracts in writing, made between the months of December, 1913 and September, 1915, the defendants contracted to sell to the plaintiffs large quantities of cotton handkerchiefs.

It is admitted that on the 13th March, 1918, the defendants repudiated the said contracts and refused to make any deliveries thereunder and at the time there were still undelivered to the plaintiffs 105,000 dozens of said handkerchiefs.

The defence of the defendants rests entirely upon Section 3 of the Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5 c. 25), which provides "That where the non-fulfilment of any Contract "was due to the compliance on the part of any person with any "requirement, regulation, order or restriction of any Government "Department . . . or with any direction or advice issued or "given by any Government Department with the object of pre-"venting transactions which in the opinion of the Department "would or might be contrary to national interests in connection "with the present war, proof of that fact shall be a good defence "to any action or proceeding in respect of the non-fulfilment of "the contract." The section further provides that "a certifi-"cate by the appropriate Government Department shall be "sufficient evidence that such direction or advice was issued or "given and with such object as aforesaid."

It became necessary in the course of the war to subject the export of goods from the United Kingdom to foreign countries to very close supervision by the British Government and for the purpose of assisting exporters in obtaining information as to their customers abroad the War Trade Intelligence Department was formed and exporters were advised to refer to that Department before doing business with European firms. The defendants in the present case sought the assistance of the War Trade Intelligence

Department in the month of June, 1916, and subsequent to the passing of the Courts (Emergency Powers) Act, 1917, they repudiated the contracts in consequence, as they alleged of the advice given to them. On the 28th October, 1918, Sir Henry Penson, Chairman of the Department, by a certificate under his hand, given in pursuance of Section 3 of the Act, certified that in the month of June, 1916, the Department with the object of preventing transactions which in the opinion of the Department would or might be contrary to national interests in connection with the present war advised the defendants not to do business with the plaintiffs and further certified that this advice had never been withdrawn. It was admitted by the plaintiffs in the course of the argument that the War Trade Intelligence Department was the appropriate Department to give the certificate; but it was contended that the certificate was not conclusive evidence of the facts stated and that it was open to them to impeach the truth of the statement by other evidence. This view was accepted by Lord Justice Moore at the trial, and he admitted evidence with the object of contradicting the certificate.

It is clear that if the certificate is conclusive no evidence should have been admitted with the object of contradicting its plain terms.

If, on the other hand, the certificate is not conclusive but only prima facie, evidence was properly admitted and we are bound to consider its weight and effect.

The word used in the section is neither "conclusive" nor "prima facie" but "sufficient," and the meaning of the word "sufficient" has been considered in many cases, to which it will be necessary for me shortly to refer.

The result, in my opinion, is that the certificate is "conclusive" if it stands alone but that it is still open to the other party to give evidence to contradict the certificate, and that the onus is cast upon such party of affirmatively disproving the facts as stated in the certificate.

In *Barraclough* v. *Greenhough* (1) a notice had been given under Section 64 of the Probate Act, 1857 (20 and 21 Vic. c. 77) of intention to give the Probate in evidence as proof of a devise. The section provides that "in such case such Probate shall be "sufficient evidence of such Will and of its validity and contents," and the Court of Queen's Bench held that the Probate was conclusive evidence of the validity of the Will, but this

(1) L.R. 2 Q.B. 1.

decision was reversed in the Court of Exchequer Chamber and it was there held that while the Probate alone would be sufficient evidence to give to the jury of the devise, there was nothing to prevent the other side from showing by evidence that the Will was not valid or that the testator was not competent.

In *Ystalyfera Iron Co.* v. *Neath & Brecon Railway Co.* (1) a somewhat similar question arose on the meaning of Section 17 of the Lands Clauses Act, 1845, which provides that " a certificate under the hand of two justices certifying that the whole of the prescribed sum has been subscribed shall be sufficient evidence thereof and on the application of the promoters of the undertaking and the production of such evidence as such justices shall think proper and sufficient, such justices shall grant such certificate accordingly." Jessel M.R. held that the certificate given by two justices in that case was conclusive on the ground that it was not intended to allow every land owner on the line to decide as to whether sufficient capital had been subscribed but that what was meant was that the Legislature should appoint a competent tribunal to decide the question and that the certificate of that tribunal should be final. It seems to me that considering the words of the Statute the decision in that case was right and the certificate was in fact a judicial determination.

In *Lewis* v. *Leonard* (2) the question arose as to the effect to be given to Section 49 of the Bankruptcy Act of 1876 which provided that " an Order of Discharge shall be sufficient evidence of " the bankruptcy and the validity of the proceedings thereon," and the Court of Appeal was unanimously of opinion that the word " sufficient " there meant " conclusive "; having regard to the fact that if a person interested objected to the Order he could have applied to be heard against the making of it or if made to set it aside, but he could not allow it to remain in existence and long afterwards to assert that it was not binding on him or that he could give evidence to contradict it.

In *The Queen* v. *Fordham* (3) the question arose as to whether an auditor's certificate, which was stated to be " sufficient " evidence under Section 9 of 11 & 12 Vic. c. 91 was conclusive, and it was held not to be conclusive but to be sufficient prima facie evidence, and that consequently a person could show that the monies alleged to be due under it had since been paid in part or in whole.

In *Harrison* v. *Richards* (4) it was held by the Queen's Bench Division that the certificate of an analyst under Section 21 of the

(1) L.R. 17 Eq. 142. (2) 5 Ex. D. 165.
(3) L.R. 8 Q.B. 501 (4) 45 J.P. 552.

Sale of Food and Drugs Act, 1875, which by this section it is provided " shall be sufficient evidence of the facts therein stated unless the defendant shall require that the analyst shall be called as a witness . . . and the defendant may, if he thinks fit, tender himself and his wife to be examined on his behalf and he or she shall if he so desire be examined accordingly " was not conclusive, but that it could not be thrown over merely by an opinion of the Magistrate not founded on the evidence, and that no evidence having been given to contradict the certificate that the decision of the Magistrate was wrong.

A similar decision was arrived at by the Queen's Bench Division in 1896 in *Hewitt* v. *Taylor* (1), Kay L.J. stating " the certificate " is sufficient evidence, and if nothing else appears the Magistrates may convict upon it; but it is not " conclusive evidence, otherwise the rest of the section would have no meaning." The evidence of the plaintiff is plainly made admissible to show that the certificate is inaccurate and the Magistrates had to weigh the evidence and decide the matter not as a question of law but as a question of fact.

In the *Board of Trade* v. *The Sailing Ship Glenpark, Ltd.* (2) Bingham J. held at a trial without a jury that a certificate given under Section 193, Sub-section 3 of the Merchant Shipping Act, 1894, which provides " that a certificate of the expenses " incurred by the Board of Trade shall be sufficient evidence that " the expenses were incurred or repaid by or on behalf of the " Crown," was in fact conclusive of the facts stated, but when this case came to the Court of Appeal (3) that Court declined to express any opinion as to whether the account and proof of payment was made conclusive evidence by the sub-section, but they held that it certainly was conclusive in absence of evidence to the contrary. In *Garbutt* v. *Durham Joint Committee* (4) a somewhat similar question arose under Section 4, Sub-section 1, of the Police Act, 1890, and Lord Loreburn held that the certificate given by the Chief Officer of Police in that case was not conclusive of anything, but it was sufficient evidence—that is to say, that the Court might act on it if they thought fit.

I have now dealt with the cases which occurred before the passing of the Act of 1917. The first case—*Manuel Mas* v. *Bookless Bros.* (5)—was heard in the Court of Sessions in Scot-

(1) [1896] 1 Q.B. 287. (2) [1903] 2 K.B. 324 (3) [1904] 1 K.B. 682.
(4) [1906] A.C. 291. (5) (1917, 2 Scots Law Times 139).

land by Lord Ormidale. The action was brought to recover damages against Bookless Bros. for breach of contract, and it appears that the defenders sold to the pursuer 4,000 bales of cod fish, and that in consequence of advice given to them by the War Trade Intelligence Department they broke the contract. A certificate was given by Sir Henry Penson to the same effect as the certificate given in the present case, but it turned out that the Department had made a mistake and had confused the pursuer with another merchant of the same name who was not a fish importer but a fruit exporter, and that there was in fact no evidence against the pursuer. The Court held that while it was a very hard case, the non-fulfilment of the contract by the defenders was due to their compliance with the advice of the War Trade Intelligence Department and that consequently they were protected by the Statute. The question of the validity of the certificate did not arise in this case because it had to be admitted that the advice was in fact given and had the effect contended for. If, however, the pursuer could have proved in that case, notwithstanding the certificate, that the advice in fact given clearly referred to and could only refer to Bookless Bros., Fruit Importers, and that the defenders were altogether wrong in thinking it as applicable to their customers the Fish Importers it seems to me such evidence should be admitted.

In the *Gans Steam Ship Line* v. *Celtic Shipping Co., Ltd.*, (1) —which was an action for a breach of a charter-party—the defendants produced a certificate from the Admiralty in accordance with the last clause of Section 3 of the Courts (Emergency Powers) Act, 1917, and it was stated by Atkin J. in the course of his judgment, that the certificate was conclusive as to the matters referred to by it. There was not, however, in that case nor indeed could there be any evidence to contradict the certificate and the decision of Atkin J. was clearly right.

Considering all these cases and giving full weight to the words which are used in the section, I do not think that the section is necessarily conclusive, but it undoubtedly is conclusive in the absence of cogent and direct evidence to the contrary. On a review of the authorities it seems to me that the word "sufficient" has never been held to mean conclusive in the sense of being irrebuttable except in cases where the certificate or order was in fact a judicial determination and the certificate was given or order

(1) 34 T.L.R. 282.

made by the person or tribunal whose duty it was to determine.

I agree fully with the analysis of the evidence given by the Lord Chancellor and am satisfied that in so far from in any way displacing the evidence of the certificate it tends to corroborate it in every material particular.

I am also satisfied that the non-fulfilment of the contract was due to the following of that advice and I consequently think that the judgment of the Court of Appeal in Southern Ireland was right and that this appeal should be dismissed with costs.

MURPHY v. SYNNOTT, AND OTHERS.

[1924. No. 1.]

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Club—Expulsion of Member—Resolution of Committee—Validity—Limited Liability Company Proprietor of Club—Articles of Association—Rules of Club—Powers of Committee.

Prior to the year 1885 a working men's club was formed in N. In that year a Company was registered under the Companies Acts limited by shares called the "C.W.M. Club Company, Limited." The company acquired the property and premises of the club and held the club premises on a yearly tenancy subject to a rent. M., the plaintiff, was a proprietary member of the Club. On 2nd November, 1923, the committee passed a resolution to close the club every night at 11.30, and they adopted three by-laws (1) as to persons to whom bar refreshments should not be supplied; (2) prohibiting singing or excessive drinking, or disorderly conduct on the club premises, and (3) declaring that the club premises should be closed punctually at 11.30 p.m., when all games must have ceased.

A printed notice containing these by-laws was posted in the rooms of the club some time prior to November 25, 1923.

Acting under these regulations, the committee called upon M., the plaintiff, to attend a special meeting to investigate a charge that he had been guilty of disorderly conduct on the club premises.

M. did not attend nor offer any explanation, and at a subsequent meeting of the committee a resolution expelling him from the membership of the club was passed unanimously.

In an action for a declaration that the plaintiff was still a member of the club:—

Held by Wilson, J. (1) that the committee were not in law the directors of the company and had no authority to exercise the powers of the directors to exclude the plaintiff from membership of the club; and (2) that the power of expulsion that existed had not been exercised by the committee in accordance with the procedure laid down in the rules of the club.

TRIAL OF ACTION.

Prior to the year 1885 a working men's club was formed in Newry. In that year a company limited by shares and called the "Catholic Working Men's Club, Newry, Company, Limited," was registered under the Companies Acts. The company acquired the property and premises of the club, and held the club premises on a yearly tenacy subject to a rent. Michael Murphy,

the plaintiff, was a proprietary member of the club. Under the articles of association the directors had power to make rules and by-laws for the conduct of the club, and such rules might provide for the terms and mode of admission and expulsion of members or shareholders. There was no record of the election of any directors of the limited company since its incorporation. The committee elected at a meeting of the club each year were regarded as being ipso facto elected as directors of the limited company. Each year the members of the committee were returned to the Registrar of Joint Stock Companies as the directors of the company. The articles of association provided that the directors should retire annually, and must be appointed at the annual general meeting of the limited company. Some time after the passing of the Registration of Clubs (Ireland) Act in 1904 a set of rules was adopted, and these rules were registered as the club rules.

The committee for the year 1923-1924 was elected on 26th October, 1923. This committee, on November 2, 1923, passed a resolution that the club should close every night until further orders at 11.30, a bell to be rung at 11.15 so that those in the card room could, if they so wished, have refreshments before the club closed. Three by-laws were passed by the committee: (1) dealing with the persons to whom bar refreshments could not be supplied; (2) prohibiting singing or excessive drinking, and warning members guilty of disorderly conduct on the club premises that they would be severely dealt with by the Committee; (3) declaring that the club premises would be closed punctually at 11.30 p.m. when all games must have ceased. A printed notice setting out these by-laws was posted in the rooms of the club for some time prior to November 25, 1923. The plaintiff received notice from the committee to attend a meeting, when they would investigate certain charges against him of disorderly conduct on the club premises. He did not attend either then or on a subsequent occasion when he was again asked to attend. Thereupon a notice was issued calling upon the plaintiff to attend a special meeting of the committee, when his expulsion would be proposed. On December 18, 1923, the committee met and passed unanimously a

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resolution that the plaintiff be expelled, and on 19th December, 1923, the secretary wrote to the plaintiff, informing him that a resolution had been passed by the committee expelling him from membership.

The articles of association of the limited company, so far as material, were as follows:—

"Article 6 (c). They (the directors) may from time to time propose rules and by-laws to provide and regulate the terms on which persons shall be entitled to have access to and to use the premises of the club, and to participate in the amusements or other advantages which may from time to time be offered by the club, or by any club or association formed in connection therewith, and generally to provide for exigencies not provided for by these articles or the articles of "Table A." incorporated herein. Such rules may provide (amongst other things) for the term and mode of admission and expulsion of members or shareholders. All such rules shall, nevertheless, be considered operative and binding from the date of their being made until the date of their approval and confirmation by such meeting as aforesaid.

(d) They may exclude from the club any shareholder or member who shall fail in the observance of any regulation of the club, or of any regulation or order of the directors, or of any committee of them, or who shall, in the judgment of the directors, have been guilty of any act, practice, or conduct calculated to bring discredit on or to lower the status of the club, or of any club association in connection therewith. Such shareholder or member shall have seven clear days' notice sent to him to attend the meeting at which his exclusion shall be proposed. Any shareholder so excluded shall thereupon (but subject to clause 4) cease to be a shareholder, but shall, nevertheless, remain liable for and shall pay to the club all monies which at the time of his ceasing to be a shareholder may be due from him to the club.

Article 9. Each shareholder shall have one vote only.

Article 10. All the directors shall retire at each annual meeting."

The rules of the club, so far as they were material, were as follows:—

"Rule 4. From the proprietary members a directory or committee of nine, including one chairman, one secretary, and one treasurer, shall be annually elected by ballot on the last Friday

of October in each year, and at such election shareholders alone shall be qualified to vote. The holders of a share or shares in the club to be entitled to only one vote.

Rule 6. If complaint shall be made in writing signed by three ordinary or proprietary members, of any proprietary or ordinary member to the secretary, he shall bring the matter within three days under the notice of the committee, who will have power to deal with the offender in the manner that seems to them most judicious, an explanation having been previously asked, and if the offender should withhold such explanation or be unable to justify his conduct, the committee are empowered to inflict a fine or pass a resolution for his expulsion, such resolution not to take effect until affirmed by the proprietary members in special meeting assembled, two-thirds of those present voting by ballot in support of such resolution.

Rule 10. The committee are authorised to draw up by-laws for the management of the club, and generally to deal with members or proprietary members transgressing the rules; and if such members or proprietary members feel aggrieved by the decision of the committee, they may appeal to the proprietary members on giving prompt notice in writing to the secretary, who will call a special meeting.

Rule 24. Any person misconducting himself on the club premises to be instantly removed and a special meeting of the committee called at once to deal with him."

The plaintiff claimed (1) a declaration that he was still a member of the Catholic Workingmen's Club, Newry, and that his expulsion by the defendants from the membership of the club was void; (2) an injunction to restrain the defendants from excluding him from the club premises or from enjoyment of the property or the rights and privileges of membership of the club; and (3) damages.

McGonigal K.C., *Megaw K.C.*, and *McGuckin* for the plaintiff:—The whole issue depends upon the construction of the articles of association of the company and the rules of the club. We submit that no justification can be found for the expulsion of the plaintiff either in the articles of association of the company or in the rules of the club. The committee were not in law the directors of the limited company, and had no authority to exercise

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the powers of the directors. No directors of the limited company have ever been appointed. The committee of the club were not legally directors of the company. Nor can the committee justify their action under the rules of the club, as they did not adopt the procedure thereby prescribed.

E. S. Murphy K.C. and *C. S. Campbell* for the defendants:—The committee were justified in taking whatever action was necessary to prevent the plaintiff from committing breaches of the club rules and also from defying the committee, who were merely taking the necessary steps to prevent disorderly conduct on the part of any of the members. We contend that the plaintiff has been validly expelled from the club. We submit that the defendants had full powers of expulsion under Article 6 (D), and that they duly exercised these powers. The committee were in fact the directors of the company, and had been recognised as such ever since the inception of the company. In any case, the committee possess power to expel a member under the rules of the club, and they validly exercised this power.

Cur adv. vult.

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WILSON, J. There is little or no dispute about the facts, which I find as follows. The plaintiff had been a member of the Catholic Working Men's Club, Newry, for many years prior to the 20th December, 1923, when the matters complained of occurred. He had also been a member of the directory or committee of the club for the years 1920-1921 and 1921-1922. He was not a member of the committee elected for 1922-1923. Prior to the election of the committee for the year 1923-1924, either on the suggestion of the defendant, Mr. Edward Curran, or otherwise, the plaintiff put forward nine members for election on the committee, and the defendants, Mr. Synnott and others, put forward another nine members for election. As the result, four of the plaintiff's and five of the defendant's, Mr. Synott's, nominees were elected, and the plaintiff was not elected. It is possible that some soreness existed in the minds of the

plaintiff and the defendants Synnott and Edward Murphy or some one or more of them as the result of the election. The meeting for the election of the committee took place on Friday, 26th October, 1923. The plaintiff continued to frequent the club premises and to enjoy the privileges of the club and his rights as member until 20th December, 1923, and was on the premises, he thinks, every day. The new committee took their onerous duties seriously, and on the 2nd November they passed a resolution that the club would close every night in future till further orders at 11.30, a bell to be rung at 11.15 so that those in the card room would have a chance, if they so wished, of having refreshments before closing, and they directed that a notice should be printed and posted up in the club containing three by-laws or regulations (1) dealing with persons to whom bar refreshments could not be supplied; (2) prohibiting singing or excessive drinking, and warning members guilty of disorderly conduct on the club premises that they would be severely dealt with by the committee on receiving from the caretaker a report of any such misconduct, and (3) declaring that " the club premises will be closed punctuallv at 11.30 p.m., when all games must then have ceased." This third regulation was in larger type than the rest of the notice. The exact date of the posting of this notice (copy of which is enclosed) is not fixed, but I have evidence on behalf of the defendants that it was posted in all the rooms of the club for some time prior to 25th November, 1923, and in all probability from 6th or 7th November, 1923. The notice was certainly calculated to draw the attention of any member using the club premises to it. It was very large, and printed in red ink. However, the plaintiff has sworn that he saw no such notice posted up, although he was in the card room every day from 24th October to 25th November, 1923. I accept the plaintiff's evidence, as on his whole testimony and demeanour I came to the conclusion that he would not swear what he knew to be false. I accordingly find as a fact that this notice was posted up in the club room for some time prior to and on the 25th November, 1923, but the plaintiff did not see it. Now it has not been argued that the committee had not power to make these regulations, and that they were not proper

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regulations to make, and that they took proper and reasonable steps to bring these by-laws to the notice of the members, including the plaintiff. We then come to the night of 25th November, 1923, when a valid regulation, properly published to the members of the club if only they would use their eyes and read it, declared that disorderly conduct if reported by the attendant would be severely dealt with by the committee, and that the club premises will be closed punctually at 11.30 p.m., and all games must then cease. The plaintiff and a number of proprietary members of the club were playing poker on the club premises after 11.30, the closing hour. Another lot of non-proprietary members were playing at another table. There were two caretakers or attendants employed in the club. One upstairs in the card room, called Martin. The other, Owen Curran, downstairs in the bar and billiard rooms. The latter was the senior, responsible for locking up the premises, and both had to get home before 12 o'clock, when curfew began in Newry at this date. I have no doubt that notwithstanding the new regulation the premises were not always closed at 11.30. and were often not closed till 11.45, but still 11.30 was the legal and proper hour for closing. There was conflicting evidence as to whether the bell was rung at 11.15. The plaintiff said that about 11.30 Martin came to his table and said "Name your deal." James Grant, one of the players, said Jack Costello's deal will be the last, which would complete another full round. Three hands later the plaintiff was dealing, and it must then have been after 11.30. The defendants, James Synnott, who was chairman of the committee, and E. Murphy, a committee man, came upstairs to the card room, behind the plaintiff's chair when he was dealing, and Mr. Synnott said, "Let this be the last deal." The plaintiff asked him "whom he was talking to, and said that he had no right to speak to him (the plaintiff). If he wanted to rule the club he could rule through the steward, whom we would obey." Edward Murphy went downstairs, and when he came up again, the steward downstairs (Owen Curran) shouted up, "Are you going to stay there all night?" Then Edward Murphy and the plaintiff had a heated discussion in the room about Murphy's (defendant's) going downstairs and

complaining to Owen Curran. The plaintiff admits having used a filthy expression to Edward Murphy in the course of the discussion, and both plaintiff and defendant Murphy raised their voices and abused one another. The game then continued till Jack Costello dealt, and they all left about 11.50. The discussion and abuse continued in the street, as plaintiff, Synnott and Edward Murphy went home in the same direction. Above is the plaintiff's account of what took place. The defendants' account is practically the same, but more vivid, if not lurid. Accepting the plaintiff's account I find that he was guilty of a flagrant breach of what was then a valid regulation of the club, and also of disorderly conduct in abusing the chairman of the committee of management of the club and one of the committee in the presence of other members and of the club servants and defying their authority, and I would not think of interfering with any action they took to restrain such conduct and prevent its recurrence, provided they acted within their powers, even though I might not myself if I had the power have taken that identical action. What the chairman and Mr. Murphy did was they verbally consulted their committee and caused their secretary to write to the plaintiff the letter of 27th November, 1923, asking him to attend a special meeting of the committee on Friday, 30th November, 1923, when they would investigate a charge against the plaintiff of disorderly conduct on the club premises on the 25th inst. The plaintiff alleges that he did not get that letter. He did not attend. At that meeting Mr. Synnott explained what had taken place, and it was agreed to write and summon the plaintiff for the monthly meeting on Friday, 7th December, 1923, to offer an explanation. The letter of 4th December, 1923, was then sent to plaintiff summoning him to that meeting to offer an explanation. He received that letter, and did not attend or offer any explanation. However, he consulted his solicitors, and instructed them to write the extraordinary letter of 6th December, 1923, to Messrs. Synott and Edward Murphy complaining of their having interfered with plaintiff's rights and privileges as a member of the club on 25th November, demanding an apology, and threatening legal proceedings in default. Apparently

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plaintiff thought that it was part of his rights and privileges to abuse the chairman and a member of committee in the presence of the club servants when they were trying to get the plaintiff to observe the regulations of the club and to have the club properly conducted. I cannot conceive any rational person thinking that he had any such right or privilege. At the meeting on 7th December, 1923, the committee directed the secretary to give plaintiff notice to attend a special meeting on Tuesday, 18th December, 1923, when his expulsion would be proposed. Plaintiff did not attend on the 18th December, 1923. Mr. Synnott and Mr. Edward Murphy were present but retired from the meeting before plaintiff's case was dealt with, and it was proposed and seconded that plaintiff be expelled, and this was carried unanimously. On 19th December, 1923, the secretary notified the plaintiff that a resolution had been passed by the committee expelling him from membership of the club, and plaintiff got that letter. The plaintiff attended at the club in protest against his expulsion, and was refused the rights and privileges of a member by the servants acting, no doubt, on the orders of the committee. The question for decision is had the committee power to expel the plaintiff from membership of the club in the circumstances? I have stated already that if they had the power they were justified in doing so on the facts. In the year 1885 a limited liability company was formed under the Companies Acts limited by shares, with its memorandum and articles of association, called The Catholic Working Men's Club Company, Limited, with a capital of 1000*l.*, divided into 2,000 shares of 10*s.* each. The acquisition of The Catholic Working Men's Club then in existence was within its powers. They acquired that club, and hold the club premises on a yearly or half yearly tenancy subject to a rent. Table A of the Companies Act, 1862, save so far as altered by the articles of association, was incorporated amongst the articles. Article 6 set forth further powers than those in Table A given to the directors, and 6 (c) gives the directors powers to make rules and by-laws for the conduct of the club, and such rules may provide for the term and mode of admission and expulsion of members or shareholders, and all such rules shall be considered operative and binding from

the date of their being made until the date of their approval and confirmation of such meeting as aforesaid referring to a general meeting under 6 (a), and Article 6 (d) deals, apparently, with a different matter, viz., excluding a shareholder or member who shall fail in observance of any regulation of the club or of any regulation or order of the directors, or who shall in the judgment of the directors have been guilty of any act, practice, or conduct calculated to bring discredit on or to lower the status of the club, and provides that such shareholder or member shall have seven clear days' notice sent to him to attend the meeting at which the exclusion shall be proposed. The articles further provided that each shareholder shall have one vote only and that the directors shall all retire at each annual meeting. This limited company is a creation of statute, and can only work through its directors and at meetings of the shareholders whether general or extraordinary. The company was, of course, composed of its shareholders. The limited company was the proprietor of the club, which consisted of shareholders called proprietary members and members who were not shareholders of the limited company. Both proprietary and non-proprietary members paid a subscription to the club. Sometime after the passing of the Registration of Clubs (Ireland) Act, 1904, rules were adopted and registered as the club rules. These are expressly rules of the Catholic Working Men's Club, Newry. Whoever drew them did not keep the distinction between the limited company which owned the club and the club itself clearly before his mind as is clear from Rule 2, which stated that the capital of the club is 1000*l.* divided into 2000 shares of 10*s.* each, when in law and truth the club had no capital. Rule 4 provided for the election of a directory or committee of nine, including one chairman, one secretary and one treasurer annually from the proprietary members, on the last Friday of October in each year, and at such election shareholders alone shall be qualified to vote, the holders of a share or shares in the club (meaning the limited company) to be entitled to only one vote. Rule 5 draws a distinction between ordinary and proprietary members of the club, the former if in arrear in payment of his subscription on

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the due dates shall not be at liberty to use the premises for any purpose whatsoever, and the latter also excluded except as shareholders attending the annual meeting. Rule 6 deals with the only express power of expulsion given to the committee, and on comparing the correspondence with the wording of this rule I am of opinion that the proceedings taken by the committee to expel the plaintiff were taken under this rule, although no complaint of the plaintiff in writing signed by three ordinary or proprietary members was made to the secretary as provided therein, but it was brought to the notice of the committee within three days from complaint, viz., on 30th October and letter of complaint dated 27th October; then the letter of 4th December asked for an explanation. No explanation having been offered and no justification proved at the meeting of 10th December a resolution for plaintiff's expulsion was passed, as provided for by this rule, on 18th December, but at this time seven days' notice was given on 10th December that on Tuesday, 18th December, plaintiff's expulsion would be proposed. Possibly the committee thought they would justify their position by giving the seven days' notice to attend the meeting at which his expulsion would be proposed provided for by Article 6 (d) to be given by the directors, if the directors of the limited company were proceeding to exclude a shareholder or a member whose exclusion would be proposed. I do not think this seven days' notice can help the defendants. The word used in the notice is expulsion, taken from Rule 6; and not exclusion, taken from Article 6 (d), and further, in law the committee were not the directors of the limited company and had no power to exercise the powers of the directors under Article 6 (d) or any other powers of the directors of this limited company. It would appear from the evidence that there is no record of the election of any directors of the limited company since its incorporation. The shareholders and advisers of the company and the members of the club proceeded on the belief that the committee elected at a meeting of the club each year were ipso facto elected as directors of the limited company and returned such committee each year as the directors

of the limited company to the Registrar of Joint Stock Companies. This belief was founded on the fact that only by shareholders and from the shareholders of the limited company could such committee be elected and selected under the rules. Under the articles of the limited company the directors retire annually and must be appointed at the annual general meeting of the limited company. The annual general meeting of the limited company was held on 24th October, 1923, when the secretary's report and the balance sheet and accounts were submitted. It was adjourned to 25th October, when the accounts were adopted and passed and the report accepted, but no directors of the company were elected for the year 1923-1924. The committee of the club was elected on Friday, 26th October, at a meeting to elect the committee for the ensuing year, and that committee though selected from shareholders and elected by shareholders who had only one vote each might or might not be the same individuals as the directors if directors had been elected, but were merely the body to manage the club under the rules made for that purpose, and in my judgment could only exercise the powers of such committee given by those rules. The defendants cannot justify their action in refusing the rights and privileges of membership of the club to the plaintiff under the articles of association of the limited company. They cannot justify under Rule 6, because their resolution for plaintiff's expulsion under that rule was not effected until affirmed by the proprietary members in special meeting assembled, two-thirds of those present voting by ballot in support of such resolution. They cannot justify under Rule 10, because (1) I hold on the true construction of these rules that Rule 10 does not apply to expulsion already expressly dealt with by Rule 6, and (2) plaintiff's misconduct was not a breach of a rule within the meaning of that word in Rule 10. Nor can the committee justify under Rule 24, because they did not proceed under that rule, and further, that rule, I hold, cannot include expulsion already expressly dealt with under Rule 6, unless the procedure in Rule 6 is made applicable to the misconduct alleged. I would further point out that the whole of the claim and defence is based on a breach of the

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plaintiff's rights as a member of the club and a justification by the committee of the club as such committee. The directors' powers are referred to for the first time in the rather mysterious answer to plaintiff's notice for particulars. I must therefore give plaintiff the declaration he seeks in this action. I will make no order at present as to the injunction sought, but I will give liberty to the plaintiff to apply for such injunction if he is so advised. As to the damages. No loss or damage has been proved, and I am not aware whether plaintiff has paid or tendered his quarterly subscription on 1st February, 1st May, and 1st August, 1924, and I can only give nominal damages for his exclusion up to 1st February, 1924, say 10s. As to the costs, I am of opinion that the plaintiff has succeeded on the technical law and the defendants have succeeded on the merits. The plaintiff brought this trouble on himself by his loss of temper and misconduct, and justice will be done by ordering each party to abide their own costs.

Solicitors for the plaintiff: *Collins and Collins.*

Solicitors for the defendants: *O'Hare and O'Hagan.*

J. McC.

REX v. ROBERT GILCHRIST (1).

Criminal Law—Evidence—Incest—Admissibility of Deposition of Witness Resident out of Jurisdiction—12 and 13 Geo. 5. (N.I.) c. 5, s. 9.

Appeal. 1924 Aug. 24, Dec. 2.

R. G. was indicted for incest. S. M. G., a daughter of the accused, who had made a deposition at Petty Sessions in which she swore that her father the accused had committed the alleged offence, was called as a witness at the trial, and failed to appear.

It was sworn that she could not be found, and was believed to have gone voluntarily into the Irish Free State, and to be residing in Lifford, County Donegal.

At the trial held at Londonderry for the Winter Assize County of Northern Ireland her deposition was on the application of the Crown sent to the Grand Jury, who returned a true bill against the accused. This deposition was subsequently read to the petty jury, who having heard the accused's evidence, convicted him of the offence charged.

Held by the Court of Appeal on case stated by Wilson J. under the Crown Cases Act, 1848 (36 & 37 Vict., c. 66) that the conviction should be quashed, inasmuch as it had not been shewn that the attendance of the witness whose deposition had been put in evidence could not have been procured by service on her of a writ of subpœna under clause 9 of the Customs and Excise (Adaptation of Enactments Order, 1924, No. 1 of 1924, I.F.S.).

Robert Gilchrist was indicted for the crime of incest alleged to have been committed by him in the County of Tyrone on 24th August, 1924, and on divers previous occasions, with his daughter, Sarah Margaret Gilchrist. The case was investigated at Gortin, Co. Tyrone, Petty Sessions, when the accused's daughter Sarah made a deposition alleging that the accused, her father, had committed the offence on 24th of August, 1924, and on previous occasions.

The accused's said daughter subsequently left her father's house, and, it was stated, went to reside in Lifford, Co. Donegal, in the Irish Free State.

At the trial held at Londonderry for the Winter Assize County of Northern Ireland her deposition was on the application of the Crown sent to the Grand Jury, who returned a true bill against the accused. This deposition was subsequently read to the petty jury, who having heard the accused's evidence, convicted him of the offence charged.

Wilson J. sentenced the accused to four years' penal servitude, but respited execution, and stated a case under

(1) Before Sir Denis Henry Bart, C.J., Andrews L.J., and Brown J.

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the Crown Cases Act, 1848 (36 & 37 Vict. c. 66), for the opinion of the Court of Appeal for Northern Ireland (1) as to whether the deposition of S.M.G. had properly been admitted in evidence. The case stated was as follows:—

At the Winter Assizes held at the Court House in the County of the City of Londonderry for the Winter Assize County of Northern Ireland on the 2nd day of December, 1924, Robert Gilchrist was tried before me as Judge of Assize on an indictment for incest charging him that on 24th August, 1924, and on divers other previous occasions within 12 months last past he unlawfully had carnal knowledge of his daughter, Sarah Margaret Gilchrist.

At the time of the commission of the alleged offences said Robert Gilchrist and his said daughter, Sarah Margaret Gilchrist, lived together in the County of Tyrone, portion of the said Winter Assize County, and within the Petty Sessions District of Gortin therein.

Counsel on behalf of the Crown applied to me to allow the deposition of the said Sarah Margaret Gilchrist, sworn on the 2nd day of September, 1924, before T. A. M'Kelvey, a Justice of the Peace acting in and for said Petty Sessions District, to go before the grand jury for said Winter Assize County, together with the said bill of indictment, and to be used by said grand jury as evidence on the consideration of said bill of indictment.

It was proved to my satisfaction that said deposition was taken in the presence and hearing of said Robert Gilchrist, who stood charged as in said indictment, and that he had an opportunity to and did cross-examine said Sarah Margaret Gilchrist, and that said deposition was duly sworn by said Sarah Margaret Gilchrist at said Petty Sessions, before the said T. A. M'Kelvey, Justice of the Peace for the said County and Petty Sessions District.

It was further proved that said Sarah Margaret Gilchrist continued to live at her father's house till the 12th of November, 1924, when she voluntarily went to the hiring fair at Strabane and went to service at or near Lifford, in the Irish Free State, where she still is. The police were unable to serve the said Sarah Margaret Gilchirst with notice to attend the said Winter Assizes on the said 2nd day of December, 1924, owing to her having gone voluntarily into the Free State, as aforesaid. I caused the said Sarah Margaret Gilchrist to be called to come and appear and prosecute said charge in open court and outside the court, and she did not appear.

(1) See 13 Geo. 5 (sess. 2) c. 2, sch. 1 6 (2)

The Crown Counsel contended that said Deposition was admissible as evidence under the provisions of the Northern Ireland Act of 12 and 13 Geo. V., Ch. 5, Sec. 9, and in particular under the words " or otherwise " in said Section. I was told that one of the judges of the Northern High Court had admitted a deposition and another had refused to admit a deposition under similar circumstances, and though my opinion was against its admissibility I thought it proper that the question should be finally decided. I accordingly admitted the deposition at the risk of the Crown and subject to this case to be stated for the Court for Crown cases reserved for Northern Ireland.

The said deposition was sent to the said grand jury and used by them, and they found a true bill thereon.

The said Robert Gilchrist was thereupon duly tried before me on said indictment. Said Sarah Margaret Gilchrist was again called, and did not appear. Then said deposition was put in evidence subject as aforesaid, and Robert Gilchrist was found guilty by the jury of the charge in said indictment.

I sentenced the said Robert Gilchrist to 4 years' penal servitude from the 2nd day of December, 1924, and respited the execution of said judgment on said conviction until the following question of law shall have been decided by this Court, and I remanded the accused in custody pending said decision.

The said indictment and the deposition of the said Sarah Margaret Gilchrist, sworn on the 2nd day of September, 1924, are appended hereto, and are incorporated with this case.

The question of law for the Court is

> Was the said deposition of said Sarah Margaret Gilchrist admissible as evidence before the grand jury and at the trial of said Robert Gilchrist on said indictment under the circumstances aforesaid?

I submit that if said deposition was not admissible in evidence the said indictment, conviction, judgment, and sentence should be quashed.

J. C. Davison (with him, *J. Williamson K.C.* and *T. H. Maxwell K.C.*), for the Crown :—

We rely upon the provisions of Section 9 of the Civil (N.I.) Authorities (Special Powers) Act, 12 & 13 Geo. 5 c. 5, extending the provision of the Petty Sessions (Ireland) Act, 1851, 14 & 15 Vict. c. 93, which only permitted the deposition of a witness to be read where the

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witness was dead. Section 9 authorizes the reading of a deposition as evidence not only, as in England, where it is proved that a witness is so ill as to be unable to travel, but also "where the attendance of the witness cannot be "procured owing to the prevalence of a state of disorder "or otherwise." Here the witness could not be found, and is believed to have gone out of the jurisdiction into Donegal. There is provision for the issue of a writ of subpœna under Clause 9 of the I.F.S. Customs and Excise Adaptation of Enactments Order, 1924 (1).

[ANDREWS L.J. How is it shewn that the attendance of the witness could not be procured?

Davison. It was only on the morning of the trial that it was discovered that the deponent had gone to Lifford.

SIR DENIS HENRY BART C.J. This conviction must be quashed. It is only in the case of death, illness or where the attendance of the witness cannot be procured owing to the prevalence of a state of disorder or otherwise, that a deposition made at Petty Sessions is admissible at the trial. A subpœna might have been issued for the attendance of the accused's daughter, but this was not done.

ANDREWS L.J. and BROWN J. concurred conviction quashed.

Solicitor for the Crown: *H. H. Mussen*, Assistant Chief Crown Solicitor for Northern Ireland. J. McC.

(1) This order is printed in Iris Oifigiuil (Dublin Gazette), March 21, 1924, and provides in clause 9

"Every provision contained in any British Statute and relating to :—

(a) the endorsement and execution in Ireland of Warrants issued by Justices, Courts, or Judges of Courts in England, Scotland, the Channel Islands, or the Isle of Man;

(b) the service in Ireland of Writs of Subpœna and of Superior Courts in England or Scotland, and to the punishment in Ireland of persons disobeying the same:

shall apply respectively to:—

(I.) the endorsement and execution in Saorstat Eireann [the Irish Free State] of Warrants issued by Justices, Courts, or Judges of Courts in England, Scotland, Northern Ireland, the Channel Islands, and the Isle of Man; AND

(II.) the service in Saorstat Eireann of Writs of Subpœna of Superior Courts in England, Scotland, and Northern Ireland, and to the punishment in Saorstat Eireann of persons disobeying the same; and every such Warrant and Writ of Subpœna shall in Saorstat Eireann have the like effect and shall be dealt with in like maaner as if it had originated in Saorstat Eireann.

[As to service in Northern Ireland of a Subpœna from the Irish Free State Courts see S.R. & O. 1923 405 I.F.S. (Consequential Adaptation of Enactments Order, 1923. Or, in C. Buckingham Palace 2), March, 1923. Ed.]

CARROLL v. ROUTLEDGE (1).

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(1924. No. 219.)

Landlord and Tenant—Premises Let in Separate Floors—Injury from Overflowing Cistern—Absence of Contractual Liability to Repair—Control of Premises—Negligence.

The plaintiff was the tenant of the ground floor in premises of which the defendant was the landlord. Water overflowed from a cistern in the first floor occupied by another tenant of the defendant and caused damage to the plaintiff's goods. This having been discovered by the plaintiff, he informed the defendant, who employed a plumber to execute necessary repairs.

In an action tried before Andrews L.J. a verdict was found for the plaintiff. On motion to set aside the verdict and judgment

Held by the Court of Appeal, that on the evidence the landlord was not in control of the premises, and was therefore not liable to the plaintiff.

MOTION by the defendant to set aside the verdict and judgment entered for the plaintiff.

The plaintiff carried on business as a draper, in Londonderry, in certain premises, the ground floor of which was held by him as a monthly tenant under the defendant. He had carried on business in the premises since December, 1916. In 1917 he noticed water coming through the ceiling of the premises occupied by him, and informed defendant's agent. Afterwards he pointed out the mark on the ceiling to a sanitary officer. Some repair work was afterwards done upstairs and the trouble ceased.

On 2nd October, 1923, the plaintiff found water pouring down from the ceiling of his premises. He went upstairs, where he saw water going over the sides of the cistern. The plaintiff told the defendant of the flooding in the premises. The defendant visited the premises, and said he could do nothing, and told the plaintiff to get his (the defendant's) plumber and get it fixed. On the following day the defendant again visited the premises and said, "It must have been some of the blackguards who were carrying on a dancing class who had done it." That day he came up with his own plumber, who fixed the cistern. At the trial before Andrews L.J. and a common jury it

(1) In the Court of Appeal before Sir Denis Henry, Bart, C.J., and Moore, L. J.

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was proved that there was no overflow pipe; that this could have been made at little expense, and that the soldering between the copper ball and brass nipple had given way. The defendant proved that he had had the premises since 1914, and admitted that overflow pipes were to be found in almost any house built during the last ten years.

The jury found that the cistern was under the control of the defendant Routledge; that the flooding and damage was caused both by the ball-cock of the cistern not being in a proper state of repair and by the absence of an overflow pipe on the cistern, and that the defendant Routledge was negligent in respect of not keeping the ball-cock in proper repair and also in not having an overflow pipe attached to the cistern, and they returned a verdict for £207 10s. for the plaintiff.

The learned Lord Justice entered judgment accordingly.

Babington K.C. and *M'Coy* for the defendant:—

The action is one of negligence and nothing more. An obligation to repair is a very different thing from negligence. We submit that a landlord not in control of the premises is not liable for negligence. The word control which has been used in this case should be possession.

To succeed, the plaintiff must prove things; that Routledge was in control and possession of the premises, and that the supply of water to the cistern was allowed to escape in the manner alleged by the plaintiff, that is by corrosion of the ball-cack. There was no evidence that an overflow pipe was necessary, nor was there any evidence of negligence on the part of Routledge. The onus is on the plaintiff to show that Routledge was brought into privity with the damage that was done, so as to prove negligence. Beven on Negligence, p. 118 (3rd edition). If the premises were under the control of Routledge, different considerations would arise, but Routledge had parted with the control of the premises by leasing them to a tenant. There was no control in the sense in which that word must be used in a case of this kind. Here the defendant was neither in control, nor in possession of the premises. There is no

evidence that the ball-cock was out of repair up to the night when the flooding took place, nor is there any evidence of notice of damage to this cistern. It was not necessary that the overflow pipe should be fitted with the very latest improvements. *Carstairs* v. *Taylor* (1). The words used by Bramwell B. in the concluding paragraph of his judgment at p. 222 apply to the present case.

The law with reference to lock-up shops and flats was dealt with in *Ross* v. *Fedden* (2), where it was held that the doctrine of *Fletcher* v. *Rylands* (3) does not apply to such cases. *Ross* v. *Fedden* (2) goes to show what amounts to negligence. Here there was no negligence and therefore no liability. The present case is stronger than *Ross* v. *Fedden* (2), which is an authority in our favour. The cases establish that even if there is control, there must also be negligence. *Blake* v. *Woolf* (4). *Hargroves, Aronson & Co.* v. *Hartopp* (5). In this last case liability was held to attach for two reasons: control by landlord, and negligence of landlord. This shows the distinction between the various cases. We also rely on *Blake* v. *Land and House Property Corporation Ltd.* (6) and *Gill* v. *Edouin* (7) affirmed (8) and *Rickards* v. *Lothian* (9). We quite agree that the question of control is the vital one.

There was no evidence on which a jury could legitimately find either that the cistern was under the control of Routledge, or that the defendant Routledge was guilty of negligence. We submit that the verdict cannot stand.

Murphy K.C. and *McGuckin* for the plaintiff:—

The Court must assume that the evidence given by the plaintiff was believed by the jury, and it had also the express approval of the Trial Judge.

The essential matter is what was the nature of the tenancy of the upstairs premises. The contract of tenancy is not in evidence. The question as to control of the cistern is to be determined by acts done in relation to the cistern. There is evidence that there were marks on the ceiling caused by water. Possession need not include the right to repair. We submit that once we have

(1) L.R. 6 Ex. 217. (2) L.R. 7 Q.B. 661. (3) L.R. 3 H.L. 330
(4) [1898] 2 Q.B. 426 (5) [1905] 1 K.B. 472 (6) 3 T.L.R. 667
(7) 71 L.T.R. 762 (8) 72 L.T.R. 579 (9) [1913] A.C. 263

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given evidence dehors the agreement, the onus is shifted; it is then for the defendant Routledge to put the agreement in evidence. The landlord himself recognised that he was liable to do the repairs, and was in control of the premises for that purpose. There is no evidence as to the terms of the agreement. We submit that there is evidence to justify the jury's findings. We suggest that no court could say that there was no evidence to go to the jury on this question of control.

On the question of negligence *Rickards* v. *Lothian* (1) is in our favour, and we rely especially on the passages from Lord Moulton's judgment at pp. 272 and 282. We rely strongly on Martin B.'s judgment in *Carstairs* v. *Taylor* (2) at p. 223 as assisting us. *Ross* v. *Fedden* (3) was a case in which there was an express finding by the County Court Judge that there was no negligence on the part of the defendants. That case differs completely from the present. *Blake* v. *Woolf* (4) was a case in which there was no personal negligence, and in no way assists the argument for the defendant. *Hargroves, Aronson & Co.* v. *Hartopp* (5) is strongly in our favour, and we rely especially on the judgment of Lord Alverstone C.J. at p. 477. All the cases show a duty to exercise reasonable care. *Gill* v. *Edouin* (6) affirmed (7) is only an authority for the proposition that absence of intentional observation is not evidence of negligence; this is very far removed from the facts of the present case, which is one of defective construction and defective maintenance.

We submit that there was evidence to go to the jury on the questions submitted to them, and that the Court should not now interfere.

Cur. adv. vult.

Nov. 28. SIR DENIS HENRY, BART., C.J. This was an action brought by James E. Carroll against Benjamin Routledge, Genevieve M'Clafferty and Teresa Kearney to recover damages against the defendants for the negligence

(1) [1913] A.C. 263
(2) L.R. 6 Ex. 217
(3) L.R. 7 Q.B. 661
(4) [1898] 2 Q.B. 426
(5) [1905] 1 K.B. 472
(6) 71 L.T.R. 762
(7) 72 L.T.R. 579

of the defendants and their servants in and about the care and maintenance of a water supply, and for damages for wrongfully storing a quantity of water in a dangerous condition. The only defendant who was sought to be made liable in the present proceedings was Benjamin Routledge.

The other defendants had not entered any appearance or defence to the action, and no interlocutory judgments had been marked against them.

The action was tried before Andrews L.J. and a common jury of the city of Londonderry on 16th July, 1924.

The learned Lord Justice left the following questions to the jury and these were duly answered.

1st: Was the cistern under the control of defendant Routledge? Answer: yes.

2nd: Was the flooding and damage complained of caused by:—

(a) the ball-cock of cistern not being in a proper state of repair? Answer: no.

(b) the absence of an overflow pipe on cistern? Answer: no.

(c) or by both (a) and (b)? Answer: yes.

3rd: If the answer to question 2(a) or 2(b) or 2(c) be in the affirmative was the defendant negligent in:—

(a) the defendant Routledge not keeping the ball-cock in proper state of repair? Answer: yes.

(b) the defendant Routledge not having an overflow pipe attached to cistern? Answer: yes.

4th: If plaintiff is entitled to damages, assess amount. Answer: yes, two hundred and seven pounds ten shillings.

On these answers he gave judgment against Benjamin Routledge with costs, and this appeal arises on an application by Routledge to set aside the verdict and judgment and to enter judgment for him upon the grounds

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1. That the verdict was against evidence and the weight of evidence.
2. That there was no evidence proper to be left to the jury
   (a) that the cistern was in the control of the defendant Routledge;
   (b) that the flooding and damage was caused either by the ball-cock not being kept in a proper state of repair, or by the absence of an overflow pipe, or by both;
   (c) that the defendant Routledge was negligent either in not keeping the ball-cock in a proper state of repair and in not having an overflow pipe on the cistern, or either of the said alleged acts, or both.

   And that the learned Judge should have withdrawn the case from the jury and should have entered judgment for defendant Routledge.
3. That the learned Judge wrongly admitted evidence upon the following matter, viz: As to the plumbing work always having been deficient by reason of the cistern having no overflow pipe.
4. That the learned Judge was wrong in leaving to the jury the questions relating to the absence of an overflow pipe on the cistern.
5. That the learned Judge misdirected the jury by directing them that there was evidence upon which they could find that the ball-cock was out of repair prior to the date of the flooding complained of.

It appeared at the trial that the plaintiff was a draper who carried on business in Londonderry in certain premises the ground floor of which is held by him as a monthly tenant under the defendant.

It was alleged that the defendant negligently kept and maintained a closet cistern and fittings on the first floor, and that water overflowed from such cistern and damaged the plaintiff's goods, for which he claimed damages.

The plaintiff proved that he carried on business since December, 1916, and the tenancy which at one time was in his father's name is now in his: the defendant, Routledge was the landlord. He also proved that "seven

years ago I noticed water coming through the centre of the ceiling under the water-closet. I informed Mr. Mitchell, defendant's agent; I showed him the marks on the ceiling. I had occasion to get repairs done to my own closet and got a sanitary official; I pointed out the mark on the ceiling to the sanitary officer. I don't know what was then done upstairs. It was done by defendant, and the trouble ceased." Dealing with the occurrence of 2nd October, the plaintiff said he found water going over the sides of the cistern upstairs, and went to Mr. Routledge. "He asked me what was wrong. I said flooding in the premises, and asked him to come down. He said he would come down, and afterwards came and said he could do no use and to go and get his plumber M'Daid and get it fixed. I went and got M'Laughlin, a plumber of my own."

"On the 3rd October defendant and Mitchell came down, and defendant said it must have been some of the blackguards who were carrying on a dancing class who had done it. That day Routledge came up with the plumber M'Daid, who fixed the cistern."

In cross-examination he proved that Routledge's co-defendants were in possession before his letting in 1917, and that he had never spoken to or seen Routledge since the letting, to this flooding.

A plumber called M'Laughlin was examined, and proved there was no overflow pipe, which could have been made at little expense. It was the soldering between the copper ball and brass nipple that gave way.

Another witness called Mulholland proved that some years ago Routledge did repairs to the upstairs closet. He superintended the work as ordered by the Factory Inspector. There was a partition to be put between the lavatory and workroom.

At the close of the plaintiff's case the learned Judge reports that Babington K.C., on behalf of the defendant Routledge, applied for a direction—on the ground that there was no evidence to go to the jury of any negligence on the part of the defendant Routledge. The defendant's position is that he is landlord. He lets first the upstairs shop with closet and fittings to Miss M'Clafferty. Plaintiff

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takes the letting with knowledge of the upstairs closet. Both are lock-up shops, each having control of their own. If Routledge had no control he cannot be in the wrong until the defect is brought to his notice which he neglects to repair. The damage was occasioned here by the ball-cock becoming detached from the spear. It was now suggested that the defendant was liable for defective original construction.

The learned Lord Justice having heard counsel for the plaintiff declined to direct, and the defendant and a number of witnessess were examined.

The defendant proved he had occupied the premises since 1914, when Miss M'Clafferty became tenant, and that he got M'Daid to screw on another ball and nipple, and also admitted that overflow pipes were almost in every house built this last ten years.

James M'Daid proved he found that the ball had broken off between the nipple and ball.

Mitchell proved that Miss M'Clafferty went into possession in July, 1917, and Carroll in November, 1917. A tenancy agreement was produced, but it was unstamped, and the learned Lord Justice reports he refused to look at it until the penalty was paid.

Both parties declined to pay the penalty and the document was rejected, and we are left without any help from the agreement.

At the close of the charge, Mr. Babington handed in a written objection, which is annexed to the notes.

The learned Lord Justice reports that what he told the jury was that there being no positive evidence on the matter they might come to the conclusion either that the damage to the ball-cock was the result of wear and tear, or that it was due to the wrongful act of some of the dancing party, and that in the latter event the defendant would, in his opinion, clearly not be negligent.

The jury found that the cistern was under the control of Routledge; that the flooding and damage was caused both by the ball-cock not being in proper repair, and by the absence of an overflow pipe, and that Routledge was negligent in both respects.

Several authorities were cited during the argument.

It seems to us that the most important question in the case was the question of control. Was there evidence that Routledge had control of it? I think there was not; a tenant had been there for over six years in occupation of the premises who has not defended this action, and the only suggestion as to the cistern that is really established against Routledge is the fact that he got M'Daid to screw on the ball after the event. This, in my opinion, is quite consistent with the control being with Miss M'Clafferty, who had the premises locked up on the night when the damage was done. Mr. Babington went carefully through the authorities, and they establish that to render the landlord liable control must be retained by him. This appears very clearly from the judgment of Lord Alverstone at p. 477 in *Hargroves Aronson & Co.* v. *Hartopp* (1). This case was considered by Lord Atkinson in *Cavalier* v. *Pope* (2), which is fully referred to in the judgment of Lord Justice Moore.

I only read a short passage from the judgment of Lord Atkinson in *Cavalier* v. *Pope* (2), " but the power of control necessary to raise the duty for a breach of which damages were recovered in the several cases to which we have been referred implies something more than the right or liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them. But this power and this right belong to the tenant, not to the landlord, and the latter's contract to repair cannot transfer them to him. The existence of such an agreement may entitle a landlord to demand from his tenant admission to the premises for the servants and workmen required to carry out his contract, but nothing in the shape of control." It is difficult to see how Routledge could enter the premises against the will of Miss M'Clafferty without exposing himself to an action. I am of opinion that there was no evidence of control, and I should also be prepared to hold that there was no evidence of negligence.

The verdict and judgment must be set aside and judgment entered for the defendant.

(1) [1905] 1 K.B. 472 (2) [1906] A.C. 428 at p. 433-4

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MOORE, L.J. This action was brought for damages alleged to be occasioned by the negligence of the defendant Routledge under the following circumstances.

Defendant was owner of a house in Waterloo Street in the City of Londonderry consisting of two storeys. In the year 1917 he let the upper floor to the defendants, Genevieve M'Clafferty and Teresa Kearney, under terms not disclosed, by a written agreement of tenancy. Shortly after he let the lower story to the plaintiff, who used it as a drapery shop. Both the upper and lower stories were used as lock-up premises.

On the morning of October 2nd, 1923, the plaintiff was aroused at his private residence, and on arrival at his business premises found water pouring into them from the premises overhead. He procured the keys of Miss M'Clafferty's premises from her, and it was then discovered that the ball-cock in the cistern of the water closet in the premises upstairs had ceased to work effectively in consequence of its being either forcibly broken or worn out, and, as there was no overflow pipe, the water had come down through the flooring and caused considerable damage to plaintiff's stock in the lower premises.

The present action was then brought claiming damages for negligence. Now negligence being a breach of duty, it is important to consider how those duties in each case arise. They may arise from the mere relation of the parties, or they may arise from contract. I can not do better than read a passage from the judgment of Ronan L.J., in *Kelly* v. *Woolworth* (1), " There is no doubt that the law casts a duty on the person in possession and occupation of premises to persons coming on the premises . . . and that these duties are fixed by law alone and arise from the possession and occupation. I shall refer to them as ' legal duties.' As between the occupier and any particular person other duties either greater or less may be substituted for these duties by contract; these I shall call contractual duties. The ' legal duty ' is cast on the owner and occupier. If it is sought to cast the duty on any one else ' a contractual duty ' must be established by the plaintiff."

(1) [1922] 2 I.R. 5 at p. 8.

In using the expression contractual duty the Lord Justice was referring to a more or less express agreement under which the liability arose. But there are other cases in which what I may call a quasi contractual duty may arise, as where the defendant by his conduct, apart from relationship, and short of definite contract, may be taken to have assumed a duty towards the plaintiff.

This judgment of the Lord Justice was given in a case where the injury complained of happened on the premises which were alleged to be demised, but his statement of the law is exactly applicable to the present case.

When, therefore, the plaintiff commenced his action, he sought to make the landlord liable as owner of the premises upstairs owing him a legal duty not to flood him. But he apparently was not very sure of his ground in this, for it is evident that he also hoped to make the defendant liable for breach of some contractual duty arising out of the contract of tenancy in respect of the upper floor. He accordingly applied to the Court on affidavit sworn 7th February, 1924, for a special order for discovery by the defendant of this agreement:

"The said last two named defendants hold their portion of the premises from the defendant Benjamin Routledge under a written agreement of tenancy. I have made repeated applications in an endeavour to obtain a copy of this agreement of tenancy, and my solicitor has also made endeavours to obtain same but has been refused. I beg to refer to the copies of letters from my solicitor to the solicitor for the defendant Benjamin Routledge, dated respectively 27th October, 1923, and 3rd November, 1923, and to a reply from the solicitor for the said defendant Benjamin Routledge, dated 30th October, 1923, on which, pinned together and marked 'A,' I have endorsed my name prior to swearing hereof.

"I verily believe the said agreement of tenancy is being kept back from me in order that I may be unable to have my statement of claim prepared. The said agreement is in the possession, power or procurement of the defendant Benjamin Routledge who has entered an appearance in this action, and I say that I have been informed by my solicitor and believe that is is wholly impossible to draft the statement of claim in this action without the production of the

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said agreement. I cannot tell at the present moment what the rights and duties as between the three defendants are in respect of the maintenance of the said cistern or in respect of the duty of repairing same and, I do not know at present if the said cistern forms part of the letting to the last named two defendants."

The order for discovery was made on February 12th, and defendant's affidavit disclosing the agreement dated 2nd July, 1917, was sworn on 1st March. Plaintiff by his solicitor presumably inspected this agreement, and therefore had full knowledge of the contents of the document before delivery of his statement of claim. Notwithstanding this the claim is studiously indefinite as to whether the defendant is sued for breach of a legal, contractual, or quasi-contractual duty.

The defendants, after delivery of the claim, required particulars of the negligence complained of, and in answer to their notice, the plaintiff furnished such particulars on July 5th under three heads: (a) "An act of negligence in the keeping and maintenance of the cistern and fittings whereby the failure of the defendant Benjamin Routledge properly to inspect and keep in good working order and repair the said cistern and fittings as a result of which negligence portion of the fittings controlling the supply of water to the cistern became so corroded that the ball-cock became removed from the lever controlling the supply and the cistern overflowed; (b) that the defendant Benjamin Routledge built the premises and caused the plumbing work to be erected therein in such a negligent fashion that the plumbing work has always been deficient; (c) that the defendant Benjamin Routledge failed to have an overflow pipe in the said cistern."

At the trial plaintiff proved that the upstairs premises were let by Routledge to the other defendants before the letting to him, and that they were since then in occupation. The defendant swore to the same effect. In the defence, Mitchell, a rent agent for the defendant, is called and on cross-examination by the plaintiff's counsel produces the agreement of letting between Routledge and Miss M'Clafferty; the Judge refused to receive it because it was not stamped, and the plaintiff elected not to put it in evidence because he was unwilling to pay the duty by way of

penalty. We know nothing, therefore, of its contents, and only this fact that the plaintiff had already obtained inspection of the document yet did not consider its admissibility as worth the penalty to him.

We must, therefore, consider the case on the evidence as free from any of the contractual duties to which I have referred, though even if such were proved as between Routledge and Miss M'Clafferty, I do not see how plaintiff could have based a claim founded on them against Routledge, with whom he had made no contract in respect of anything but his own premises.

On this sole evidence, then, that Routledge had let the upper story to Miss M'Clafferty as his tenant, and that she was in occupation of it as such, does any legal duty from Routledge to the plaintiff arise?

Cisterns in water closets and lavatories are now of the most ordinary occurrence, and a man who puts one up for use in a dwelling-house is no longer subject to the same civil risks as the defendants in *Fletcher* v. *Rylands* (1), who stored a volume of water in a reservoir. This is settled by *Ross* v. *Fedden* (2) and *Blake* v. *Wolff* (3). In the latter case at p. 428, Wright J. says: "The bringing of water on to such premises as these and the maintaining a cistern in the usual way seems to me to be an ordinary and reasonable user of such premises as these were," and proceeds to say, "and, therefore, if the water escapes without any negligence or default on the part of the person bringing the water in and owning the cistern. I do not think that he is liable for any damage that may ensue."

I think the present case is ruled by the decisions in *Cavalier* v. *Pope* (4) and *Malone* v. *Laskey* (5). In the first case there was a promise by the landlord to repair, which, as I have pointed out, is not proved in this case, because if the agreement does contain such a term the plaintiff did not put it in evidence. Lord James of Hereford, at p. 431, says: "It was ably argued at the Bar that, as the premises belonged to the defendant, he must be taken to be in possession of them, and that therefore a duty arose to maintain them in a condition that would not cause

(1) L.R. 3 H.L. 330. (2) L.R. 7 Q.B., p. 661. (3) [1898] 2 Q.B. 426
(4) [1906] A.C. p. 428. (5) [1907] 2 K.B. 141

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injury to any one who came upon them. But there seems to be a fallacy in this argument. The defendant was not in actual possession of the house in question and did not occupy it. The plaintiffs were the occupiers and the statement of claim so alleges. No duty is case on a landlord to effect internal repairs unless he contracts so to do." Lord Atkinson, at p. 433, says: "It was insisted upon by the appellant's counsel that the premises were under the control of the landlord because of his agreement to repair. I have been quite unable to follow the reasoning by which that conclusion has been arrived at. In *Miller* v. *Hancock* (1) and *Hargroves Aronson & Company* v. *Hartopp* (2), the landlord was held liable because control was retained by him; but the power of control necessary to raise the duty for a breach of which damages were recovered in the several cases to which we have been referred implies something more than the right or liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them. But this power and this right belong to the tenant, not to the landlord, and the latter's contract to repair can not transfer them to him. The existence of such an agreement may entitle a landlord to demand from his tenant admission to the premises for the servants and workmen required to carry out his contract but nothing in the shape of control."

In the second of these cases, *Malone* v. *Laskey* (3), the President, Sir Gorell Barnes, says at p. 152, of a case in some respects not unlike the present: "The argument on behalf of the plaintiff, as I understand it, is that the case is analogous to the class of cases in which the control and the possession of the premises rests with the owner . . . . In my opinion the present case is very far removed from that class of case. In the first place, the defendants were not in possession nor in occupation of these premises, nor did they exercise control over them. They had let the premises to Witherby & Company, who had in turn sublet a part to the Script Shorthand Company, &c." The only evidence, therefore at the trial being that the defendant had let the premises under a existing tnancy to Miss M'Clafferty, which, while it left

(1) [1893] 2 Q.B. 177 (2) [1905] 1 K.B. 472 (3) [1907] 2 K.B, 141

her with the ordinary rights of a tenant in possession, equally excluded him from any control, unless the plaintiff went further and proved that control remained with him to such an extent as would leave him liable for the conduct, whatever it was, which led to the accident. The plaintiff did not do this, and in my opinion the Judge should have directed the jury to find that the defendant was not in control of the premises.

Mr. Murphy has argued that the fact that the defendant subsequently did the repairs was itself sufficient evidence of an admission of liability to do them. In my opinion, following again *Malone* v. *Laskey* (1) this act of the defendant's was equally consistent with being voluntary or done in pursuance of a duty as to which, without evidence from the plaintiff, the jury were not entitled to speculate. Therefore, there was no evidence of contractual or quasi-contractual duty, and the only evidence was against legal duty, inasmuch as the defendant was not in control of the premises from which the injury flowed.

I do not propose to consider the evidence in support of the remaining findings, but I respectfully differ from the advice given to the jury by the learned Lord Justice, as appearing from his notes, in regard to the second question, when he says: " I had told the jury that, there being no positive evidence on the matter either way, they might come to the conclusion either that the damage to the ball-cock was the result of wear and tear, or that it was due to the wrongful act of some of the dancing party, and that in the latter event the defendant would in my opinion clearly not be liable."

In my opinion, since the judgment of Palles C.B. in *Gorman* v. *The Hand in Hand Insurance Company*, (2) in the absence of any direct evidence, unless there is a balance of probability in favour of a person asserting a proposition, it is the duty of the Judge to withdraw the case from the jury. But I base my judgment on the main fact that on the evidence Routledge was not in occupation, and therefore not in control, of the premises from which the damage flowed and not liable for the injury, and, even

(1) ([1907] 2 K.B. 141) (2) (I.R. 11 C.L. 224)

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if the premises were internally defective when let to Miss M'Clafferty, Routledge was not bound to put them right. *Cavalier* v. *Pope* (1).

The verdict for the plaintiff with judgment entered thereon must be set aside, and judgment entered for the defendant with costs of the action and or this application.

Solicitor for the plaintiff: *T. E. Conaghan.*

Solicitor for the defendant Benjamin Routledge: *Andrew Robb.*

J. McC.

(1) [1906] A. C. 428

ENTWISTLE AND OTHERS v. MACOUN AND OTHERS (1).

Ch. Div. 1924

Dec. 17

(1921. No. 66.)

Conversion—Partition Suit—Woman Married Since 1882—No Equity to Reconversion of Share of Realty Sold—Married Women's Property Act, 1882, (45 & 46 Vict. c. 75.)

The share in the proceeds of sale of realty sold in a partition suit of a woman married since the coming into operation of the Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75) and dying intestate after the order for sale, is not subject to an equity for reconversion.

E. M. was entitled to a share of real estate as tenant in common. She married W. T. M. in 1895. In 1921 an order for sale of that real estate was made in a partition suit to which E.M. was a notice party. She died intestate in 1923 before the sale had been completed by conveyance, leaving W. T. M., her husband, and J. M. M., her heir-at-law, and other children her surviving. Letters of administration of her personal estate were taken out by J. M'L. as attorney of W. T. M.

***Held* by Wilson J., that on the death of E. M. her share of the proceeds passed to J. M'L. as part of her personal estate.**

FURTHER CONSIDERATION. By a conveyance dated 15th January, 1915, certain real estate was assured to thirteen persons, one of whom was Elizabeth Macoun, as tenants in common in equal shares. The plaintiffs, who were some of the tenants in common, instituted this action for sale in lieu of partition and by judgment dated 6th May, 1921, it was ordered that the real estate should be sold. Elizabeth Macoun was not named either as plaintiff or defendant, but notice of the judgment was duly served upon her and she entered an appearance. The property was sold but the conveyance was not executed by Elizabeth Macoun, who died intestate leaving William T. Macoun, her husband (to whom she was married in the year 1895), and John M. Macoun, her only son, and two of his children her surviving. Letters of administration of her personal estate were granted to James M'Clatchie as attorney for William T. Macoun.

The question now arose whether Elizabeth Macoun's share of the proceeds of the sale should be treated as realty or personalty.

(1) In the Chancery Division before Wilson J.

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Wilson J.

Robb K.C., for the plaintiffs, stated the facts.

Warnock for John M. Macoun, the heir-at-law of Elizabeth Macoun :—

The share of a married woman in the proceeds of realty sold in a partition suit is nothwithstanding the order for sale, to be treated as realty by force of the Settled Estates Act, 1856, Sects. 23-25 (19 & 20 Vict. c. 120), incorporated by Sect. 8 of the Partition Act, 1868 (31 & 32 Vict. c. 40), *Mildmay* v. *Quicke* (1), unless she has requested the sale, *Wallace* v. *Greenwood* (2). Notwithstanding the Married Women's Property Acts *Mildmay* v. *Quicke* (1) is still law and is quoted in all the text books, and no reported case suggests that it has ceased to apply.

Black for J. M'Clatchie administrator of Elizabeth Macoun :—

An order for sale in a partition suit converts the share of a person absolutely entitled and sui juris at the date of the order, into personalty, in *re Dodson, Yates* v. *Morton* (3), *Herbert* v. *Herbert* (4). Elizabeth Macoun was at the date of the order for sale absolutely entitled and sui juris. The equity for reconversion depends upon the legal disability of a person not sui juris to make any subsequent alteration in the disposition or devolution of the property; the principle is stated by James L.J. in *In re Barker* (5) and has recently been reaffirmed by Swinfer-Eady J. in *Hopkinson* v. *Richardson* (6) By the Married Women's Property Act, 1882, Sects. 1 and 2 a married woman married since that Act came into operation, is under no disability in dealing with property, and the principle underlying *Mildmay* v. *Quicke* (1) does not apply to her. Cessante ratione legis, cessat ipsa lex.

WILSON J. I am of opinion that by reason of the effect of the Married Women's Property Act, 1882, in removing all disability to hold and dispose of property in the case of a woman married since 1st January, 1883, no equity to reconvert arises in circumstances such as the present, and that the reasons upon which the decision in *Mildmay* v. *Quicke* (1) was based no longer exist. Accord-

(1) 6 Ch. D. 553. (3) [1908] 2 Ch. 638 (5) 17 Ch. D 241, 243
(2) 16 Ch. D. 362. (4) [1912] 2 Ch. 268. (6) [1913] 1 Ch. 284

ingly I hold that the personal representative of Elizabeth Macoun is entitled to have her share of the proceeds of sale of the real estate paid out to him as part of her personal estate.

Solicitor for the Plaintiffs : *M'Lean and Son.*

Solicitor for John M. Macoun, the heir-at-law of Elizabeth Macoun : *Tyndall S. Johns.*

Solicitor for James W. M'Clatchie, administrator of Elizabeth Macoun, deceased : *Ivan B. Elliot.*

J. McC.

[IN THE KING'S BENCH DIVISION, IN THE COURT OF APPEAL FOR NORTHERN IRELAND AND IN THE HOUSE OF LORDS.]

1923

K. B. D.
May 12
July 3

Ct. Appeal
Nov 13
Dec. 19

1925
H. L.
Jan. 20

ALLAN
v
COMMISSIONERS OF INLAND REVENUE

CHARLES EDWARD ALLAN, Appellant;

THE COMMISSIONERS OF INLAND REVENUE, Respondents.

Revenue—Income Tax—Dividends on Shares—Incomplete Gift—Intended Transfer—Declaration of Trust.

In August 1916 A who had no marriage settlement decided to make provision for his wife and infant daughter. A draft deed was prepared but from various causes was not completed until 29th April 1919. The deed provided that A and his wife were to hold the trust funds as to one half in trust for A's wife for life and as to the other in trust for A's daughter and other children of the marriage, if any. Among the trust funds were certain shares in W. C. & Company.

At a Directors' Meeting of the Company held on 22nd February 1917 A told the Board that he was a trustee of these shares and asked for their approval to the transfer of them to himself and Mrs. A as trustees for their daughter. The Board gave the authority, and although no transfer was actually made or presented, and the shares remained in A's name, the dividends thereon were thenceforth paid into an account of A and Mrs. A as trustees for the daughter. Prior to the directors meeting A informed his wife that he was going to transfer the shares into their joint names as part of the trust fund, and that in the meantime, and until the transfer was completed, he would himself hold the shares upon trust.

The Commissioners for special purposes of the Income Tax stated their opinion that A's declaration of his intention coupled with his actions was a valid declaration of trust of the shares, and accordingly that the dividends for the years 1917/18 and 1918/19 were not part of A's income for the purposes of super-tax. This decision was affirmed by the King's Bench Division in Northern Ireland (Sir D. Henry Bart. C.J. and Brown J.) but was reversed by the Court of Appeal (Moore and Andrews L.JJ.).

Held by the House of Lords (Viscount Cave C. and Lords Dunedin, Atkinson, Sumner and Buckmaster) affirming the Court of Appeal that there was not an immediate and complete declaration of trust but merely a declaration by A of his intention to settle the shares, and of his intention meantime to keep them in medio, so that they might be ready when the trust was effectively declared, and that the whole transaction was inchoate until 1919 up to which date the dividends legally belonged to A.

APPEAL from an Order of His Majesty's Court of Appeal in Northern Ireland dated the 19th day of December 1923 varying an Order of the King's Bench Division (Revenue) of the High Court of Justice in Northern Ireland dated the 3rd day of July 1923.

The matter came before the King's Bench Division on Appeal (by way of case stated) from the Commissioners for the Special Purposes of the Income Tax Acts. The case was stated under the Finance (1909-10) Act 1910, Section 72 (6), and the Taxes Management Act 1880, Section 59, for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland. The hearings before the Commissioners for the Special Purposes of the Income Tax Acts were held at Belfast on the 4th day of November 1919 and at Dublin on the 13th day of February 1920.

The question for determination was whether the dividends declared upon certain shares in Workman Clark and Company Limited during the years ending 5th April 1918 and 5th April 1919 should be included in the computation of the Appellant's income for those years for the purpose of assessment to super-tax under the provisions of the Finance (1909-10) Act 1910, Section 66, or whether the Commissioners for the Special Purposes of the Income Tax Acts were entitled upon the evidence before them to hold that such a declaration of trust or settlement existed as to exclude from the income of the Appellant for the years ending 5th April 1918 and 5th April 1919 the dividends declared upon the said shares.

In August 1916 the Appellant, who had no marriage settlement, decided to make provision for his wife and daughter. A draft deed was submitted to him for approval in January 1917 but owing to various circumstances, including the illness of his former solicitor and the absence on active service of his then solicitor, the deed could not be finally completed until the 29th April 1919.

The Appellant and his wife Jessie Georgina Allan were the trustees of the said deed which was eventually executed upon the 29th April 1919. Under the provisions of the said deed it was declared that the trustees should stand possessed of the stocks, shares and securities specified in the schedule thereto upon trust as to one equal moiety to pay or apply the income in their discretion for the benefit of the Appellant's wife for her life and after her death upon the trusts declared with regard to the other moiety. And as to the other moiety upon trust for the Appellant's daughter Monica Stewart Allan and all

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other children (if any) of the Appellant and his said wife in equal shares, the share of each child to vest absolutely if such child should attain the age of 25 years or should be living at the expiration of 20 years and 6 calendar months from the date of the last survivor of the Appellant, his said wife and his said daughter the said Monica Stewart Allan whichever contingency should first happen, with divers limitations over.

The following stocks, shares and securities were specified in the schedule to the said deed of 29th April 1919 :—

£1,500	Six per cent. Exchequer Bonds.
£18,750	Five per cent. War Loan.
£36,700	Workman Clark & Company Shares.

The assessment of the Appellant to super-tax in respect of the dividends on the last-mentioned shares was the subject of the present appeal.

At a meeting of the directors of Workman Clark & Company Limited held on 22nd February 1917 the transfer was authorised of the above-mentioned £36,700 shares in the Company from the Appellant (who had stated that he held the shares on trust) to the Appellant and his wife, trustees of Miss M. S. Allan, and on the 1st March 1917 an account was opened in the Company's books for "C. E. Allan and Mrs. J. G. Allan, Trustees of Miss M. S. Allan." From that date the dividends on the said shares were paid into the trustee account, but owing to the legal delay hereinbefore referred to the shares remained in the Appellant's name until 31st March 1919.

Prior to the said directors' meeting the Appellant informed his wife that he was going to transfer the said shares into the joint names of himself and his wife as part of the said trust fund and that in the meantime and until such transfer was completed he would himself hold the said shares upon trust.

In pursuance of the said declaration and in order to give effect to same the Appellant applied to the directors of Workman Clark & Company Limited as required by the Articles of Association of the said Company to authorise the transfer of said shares from the Appellant to the Appellant and his wife, stating to the said directors that he was holding the said shares as trustee, and it was

by the direction of the Appellant that the trustee account hereinbefore mentioned was opened and the dividends on the said shares paid in to the said account.

The Appellant has not since the date of the said application to transfer the said shares received the dividends on the said shares or any of them, but all such dividends have been regularly paid to the credit of the said trustee account.

The Appellant's wife has received no part of the income of the trust, but same has been accumulated and stands in the books of the Company to the credit of the trustee's account.

In these circumstances the Appellant was assessed to super-tax in the sums of £40,000 and £50,000 for the years ending 5th April 1918 and 5th April 1919 respectively under the provisions of the Finance (1909-10) Act 1910 and subsequent enactments, there being included in the computation of the said sums as part of the Appellant's total income the dividends and income from the several shares and securities mentioned in the said schedule to the said deed of 29th April 1919.

The Appellant appealed against the said assessment to the Commissioners for the Special Purposes of the Income Tax Acts, and the said Special Commissioners, having heard the evidence of the Appellant, were of opinion that the Appellant's declaration of his intention, coupled with his actions, was sufficient to prove a valid declaration of trust in respect of all the shares and securities mentioned in the said schedule to the said deed of 29th April 1919 except a sum of £4,210 10s 5 per cent. War Loan.

With regard to the said shares in Workman Clark and Company Limited the Special Commissioners were of opinion that the evidence adduced to them proved a valid declaration of trust as to those shares—apart from the operation of the deed of 29th April 1919—and that the trust dated from the 1st March 1917 when the said account was opened in the Company's books in the joint names of the Appellant and his wife. The Special Commissioners accordingly held that the income arising from the said shares did not form part of the Appellant's income for super-tax purposes for the said years ending 5th April 1918 and 5th April 1919.

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The Respondents immediately upon the aforesaid determination of the Special Commissioners expressed dissatisfaction and required the Special Commissioners to state a case for the opinion of the High Court pursuant to the Finance (1909-10) Act 1910, Section 72 (6), and the Taxes Management Act 1880, Section 59, which was done accordingly.

CASE stated under the Finance (1909-10) Act, 1910, Section 72 (6) of the Taxes Management Act, 1880, Section 59, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

At Meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on 4th November 1919 and 13th February 1920 for the purpose of hearing Appeals, Mr. Charles E. Allan (hereinafter called " the Respondent ") appealed against assessments to Super-tax in the sums of £40,000 and £50,000 for the years ending 5th April, 1918, and 5th April, 1919, respectively, made upon him under the provisions of the Finance (1909-10) Act, 1910, and subsequent enactments.

There is no dispute as to figures, if our decision is correct, and the only question which was raised at the Hearing of the Appeals and on which the opinion of the High Court is desired is whether the several sums hereinafter mentioned should be included in the computation of the Respondent's total income for the purposes of Super-tax under the provisions of Section 66 of the Finance (1909-10) Act, 1910.

The following are the facts of the case, as given in the evidence of the Respondent who was the only witness examined before us:

In August 1916 the Respondent, who had no Marriage Settlement, decided to make provision for his wife and daughter. A draft deed was submitted to him for his approval in January 1917 but owing to various circumstances—including the illness of his former Solicitor and the absence on Active Service of his then Solicitor—the Deed could not be finally completed until 29th April 1919.

The Respondent and his Wife were the Trustees under the said Deed and the Income of one moiety of the Trust was to be applied, at the discretion of the said Trustees, for the benefit of the Respondent's wife during her lifetime and after her death on the same Trusts as the other moiety. The Income of the said other

moiety was to be accumulated for the Respondent's daughter and other children (if any) equally, subject to such allowances for maintenance, etc., as the Trustees might make, the share of each child to vest absolutely on attaining the age of 25.

Clause (9) of the said Deed recites that "The Trusts hereof "shall so far as the same relate to property vested in the Trustees "on or prior to the 1st day of January 1917, take effect as from "that date and as to all other property specified in the Schedule "hereto as from the date on which the same became vested."

The items in the Schedule referred to were:—

£1,500 6% Exchequer Bonds
£18,750 5% War Loan.
} All paid for out of the Respondent's own monies.

£36,700 Shares in Workman, Clark and Company Limited (of which Company the Respondent was an active Director).

The £1,500 6% Exchequer Bonds were bought and registered in the names of the Respondent and his wife on 12th December 1916.

£4,000 4½% War Loan was purchased early in 1917 by the Respondent in whose name it stood when subsequently converted into £4,210 10s 5% War Stock in March 1917.

£10,000 5% War Loan was registered in the names of the Respondent and his wife on 12th June, 1917.

£4,500 5% War Loan was inscribed in the names of the Respondent and his wife on 17th February 1917. (The balance of the sum of £18,750 was made up of £39 10s Interest converted into Capital).

Prior to the purchase of the said £1,500 6% Exchequer Bonds, £10,000 5% War Loan and £4,500 5% War Loan the Respondent informed his wife that he was going to create a trust fund for her benefit and that of their daughter and with that object was going to purchase the said Exchequer Bonds and War Loan in their joint names: same when so purchased to be held by them upon trust for her and her daughter.

The said Exchequer Bonds and War Loan were purchased in the joint names of the Respondent and his wife in pursuance of the said arrangement and as portion of the said trust fund and the Respondent so informed his wife after the purchase thereof.

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The Respondent has not received any portion of the income of the said Exchequer Bonds or War Loan since the purchase thereof.

At a Directors' Meeting of Workman, Clark and Company Limited, held on 22nd February 1917, the transfer was authorised of the above-mentioned Shares from the Respondent (who had stated that he held the Shares on Trust) to the Respondent and his wife, Trustees of Miss M. S. Allan, and on 1st March 1917, an account was opened in the Company's books for "C. E. Allan and Mrs. J. G. Allan, Trustees of Miss M. S. Allan." From that date the dividends were paid into the Trustee Account but owing to the legal delay hereinbefore referred to the Shares remained in the Respondent's name until 31st March, 1919.

Prior to the said Directors' Meeting the Respondent informed his wife that he was going to transfer the said shares into the joint names of himself and his wife as part of the said trust fund and that in the meantime and until such transfer was completed he would himself hold the said shares upon trust.

In pursuance of the said Declaration and in order to give effect to same the Respondent applied to the Directors of Workman and Clark, Limited, as required by the Articles of Association of said Company to authorise the transfer of said shares from the Respondent to the Respondent and his wife stating to the said directors that he was holding the said shares as trustee and it was by the direction of the Respondent that the trustee account hereinbefore mentioned was opened and the dividends of the said shares paid in to said account.

The Respondent has not since the date of the said application to transfer the said shares received the dividends on the said shares or any of them but all such dividends have been regularly paid to the credit of the said trustee account.

The Respondent's wife has received no part of the Income of the Trust, but same has been accumulated and stands in the Books of the firm to the credit of the Trustees' account.

Counsel, on behalf of the Respondent, contended—

That the income of the Trust did not form part of the Respondent's income for Super-tax purposes for the years under review.

On behalf of the Commissioners of Inland Revenue it was contended—

That the Income received from the property before 29th April 1919 should be treated as the Respondent's Income for the purposes of the Super-tax for the years in question.

We, the Commissioners who heard the Appeal having considered the evidence in this case, were of opinion that the Respondent's Declaration of his intention, coupled with his actions, was sufficient to prove a valid declaration of Trust except as regards the sum of £4,210 10s 5% War Loan hereinafter referred to.

As to the £1,500 Exchequer Bonds these shares were transferred into the joint names of the Respondent and his wife on 12th December, 1916, and under the Deed of Settlement of 29th April, 1919, there was in our opinion a complete Trust as from 1st January, 1917.

As regards the £4,500 5% War Loan there was in our opinion a complete Trust as from 17th February 1917, and as regards the £10,000 5% War Loan an equally complete Trust as from 12th June, 1917.

The "Workman Clark" Shares in our opinion stand in a somewhat different position inasmuch as they have never become vested in the names of the Respondent and his wife, with the result that they do not fall under the operation of the Deed of 29th April 1919. We were, nevertheless, of opinion that the evidence adduced to us proves a valid declaration of Trust—as to those Shares—apart from the operation of the Deed of 29th April 1919; and that the Trust dates from 1st March 1917, when an account was opened in the Company's books in the joint names of the Respondent and his wife.

The sum of £4,210 10s (5% War Loan) is, in our opinion, on an entirely different footing, and no evidence has been adduced in support of the Respondent's contention that there was a Trust as regards that holding. This Stock, therefore, does not fall under the operation of the Deed of 29th April, 1919, and we were not satisfied that there was any verbal trust with respect thereto. In these circumstances we held that the income arising therefrom must be regarded as forming part of the Respondent's total Income for the purposes of Super-tax. In the result we reduced the assessment for the year ending 5th April, 1918 to £36,581, and that for the year ending 5th April 1919 to £29,693.

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The following Documents were produced before us and are embodied in, and form part of this Case:—

(1) Copy Deed of Settlement dated 29th April 1919.

(2) Copy Minute of Directors' Meeting (Workman, Clark and Co., Ltd.) dated 22nd February 1917.

(3) Copy Contract Note (£4,000 4½% War Loan) dated 10th January 1917.

(4) Copy Conversion Note of £4,000 4½% War Loan to £4,210 10s 5% War Loan dated March 1917.

(5) Copy Certificate of £1,500 6% Exchequer Bonds dated 12th December 1916.

(6) Copy Certificate of £10,000 5% War Loan dated 12th June 1917.

(7) Copy Certificate of £4,500 5% War Loan dated 17th February 1917.

(8) Copy Extracts from Articles of Association of Messrs. Workman Clark and Co., Ltd.

(9) Copy Summary of Share Capital in same Company for years to 28th August 1917, and 23rd August 1918.

(10) Copy Return of Allotments made 2nd April 1919.

(11) Copy Agreement dated 2nd April 1919, as to Allotment of New Ordinary Shares out of Capitalised Profits.

(12) Copy Summary of Share Capital in same Company for year to 12th August 1919.

The Representative of the Crown, immediately upon the determination of the Appeal declared to us his dissatisfaction therewith (except as to the holding of £4,210 10s) as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance (1909-10) Act 1910, Section 72 (6) and the Taxes Management Act 1880, Section 59, which Case we have stated and do sign accordingly, the question for the decision of the Court being whether upon the evidence before us we were correct in drawing the inference that such a Declaration of Trust or Settlement existed as to exclude from the income of the Respondent for the years 1917/18 and 1918/19 the interest arising from the above-mentioned £1,500 Exchequer Bonds, £4,500 5% War Loan, £10,000 5% War Loan, and the " Workman Clark " Shares.

SIR DENIS HENRY C.J. (delivering the judgment of the King's Bench Division (1)) said: The question stated for our decision is whether upon the evidence before the Commissioners they were correct in drawing the inference that

(1) In the King's Bench Division before Sir Denis Henry, Bart., C.J. and Brown J.

such a declaration of trust or settlement existed as to exclude from the income of the Respondent for the years 1917/18 and 1918/19 the interest arising from £1,500 Exchequer Bonds; £4,500 5 per cent. War Loan; £10,000 5 per cent. War Loan, and the Workman Clark Shares. The bona fides of the Respondent is not in question and it is found that no portion of the income of the Exchequer Bonds or War Loan has been received by him since the purchase thereof.

So far as the Workman & Clark Shares were concerned the transfer was authorised to the Respondent and his wife as trustees on 22nd February 1917, and on the 1st March 1917 an account was opened in the Company's books for the Respondent and his wife as trustees for Miss M. S. Allan and the dividends were paid in to that account, but owing to legal delays the shares remained in his (Respondent's) name until 31st March 1919.

The case further finds that the £1,500 6 per cent. Exchequer Bonds were bought and registered in the names of the Respondent and his wife on the 12th December 1916; that the £10,000 War Loan was registered in the names of Respondent and his wife on 12th June 1917, and the £4,500 War Loan was inscribed in the names of the Respondent and his wife on the 17th February 1917.

The Special Commissioners find that so far as the £1,500 Exchequer Bonds are concerned there was a complete trust as from 1st January 1917; so far as the £4,500 War Loan a complete trust from 17th February 1917, and as regards the £10,000 5 per cent. War Loan an equally complete trust from 12th June 1917. They regard in our opinion properly the Workman & Clark Shares as in a different position but they find a valid declaration of trust as from the 1st March 1917 when the account was opened in the Company's Books in the joint names of Respondent and his wife.

In our opinion the trusts in respect of these various sums and shares were enforceable on the evidence as from the dates found and we answer the question put to us in the affirmative.

Nov. 13

The Commissioners of Inland Revenue appealed to the Court of Appeal of Northern Ireland (1).

(1) in the Court of Appeal before Moore and Andrews, L.JJ.

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The Attorney-General for Northern Ireland (*Richard Best, K.C.*), *Megaw, K.C.*, and *J. C. Davison* for the appellants :—

The whole framework of the deed of 29th April 1919 shows that the trusts were only declared from the date of that document. That deed is wholly inconsistent with what is purported to be declared by parol. *Heartley* v. *Nicholson* (1) lays down the following propositions with regard to parol declarations of trust (a) such declarations must be final and binding upon the settlor; (b) the subject matter of the property to be affected must be clearly defined; and (c) the objects or interests to be benefitted must be sufficiently designated. In the present case neither (a) nor (c) was observed. There was nothing more than a declaration of an intention to create a trust. We submit that no trust had been effectively declared until the execution of the trust deed in 1919. The Workman and Clark shares were not transferred to the trustees until 31st March 1919. The present case strongly resembles *Milroy* v. *Lord* (2) where it was held that although dividends had been paid to the beneficiary, there was no valid declaration of trust. A trust must be explicit, it must refer to certain defined persons. Until the trust deed was executed in 1919 the settlor was not absolutely bound. The alleged trust is of the most nebulous character.

They also referred to *Richards* v. *Delbridge* (3) and *Re Sykes Trusts* (4).

Herbert Wilson K.C., *Robb K.C.*, and *Black* for the respondent Charles Edward Allan :—

This is a perfectly good parol declaration of trust. It is not necessary to show under what limitations the respective persons are to take. The facts as given in the case stated are quite sufficient to set up a good trust in favour of the wife and children. There was an absolutely valid declaration of trust with regard to the shares in Workman, Clark Ltd. The dividends on these shares were put to the credit of the Allan trust. The moment

(1) L.R. 19 Eq. 233. (2) 4 De G. F. & J. 264.
(3) L.R. 18 Eq. 11. (4) 2. J. & H. 415.

the company put the dividends to the credit of the trust account all power over them had passed out of Mr. Allan's hands. These shares were held by the respondent on trust until a legal transfer had been executed. The cases all draw a distinction between an imperfect gift and a valid declaration of trust. *Richards* v. *Delbridge* (1) and *Heartley* v. *Nicholson* (2) were both cases of imperfect gifts.

The law on the subject is fully stated in May on Fraudulent and Voluntary Conveyances (third edition) p. 352.

[They also referred to *Wheatley* v. *Purr* (3), *Stapleton* v. *Stapleton* (4), *Baddeley* v. *Baddeley* (5).

MOORE L.J. I agree with the finding of the Special Commissioners that there was a perfected gift in trust as from 1st January 1917 of the £1,500 Exchequer Bonds transferred into the joint names of Mr. Allan and his wife as from 1st January 1917, subject to the deed of settlement of 29th April 1919.

I also agree with their finding as regards the £4,210 10s 3 per cent. War Stock, which I presume is the £4,500 5 per cent. War Loan referred to in their Judgment.

I further agree as to the £10,000 War Loan.

Everything necessary was done to transfer these securities into the names of the trustees, the gift to them was completed, and from the several periods in each case respectively the property in them ceased to be the property of Mr. Allan and the income derivable from it ceased to be his income and therefore not taxable as against him.

As regards the 36,000 Shares in Workman & Clark there is more difficulty. We must look at the case as it stood at the close of the second financial year 1918/19 in respect of which the Revenue Authorities claim tax, and for the purpose of this Case as if nothing more had been done.

At that period these shares in spite of anything that Mr. Allan had done still legally remained his property. Mr. Wilson, I suppose, feeling the effect of this has ingeniously argued that up to the date of the deed of 29th

(1) L. R. 18 Eq. 11. (2) L. R. 19 Eq. 233. (3) 1 Keen 551
(4) 14 Sim. 186. (5) 9 Ch. D. 113.

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April 1919 Mr. Allan had only declared himself trustee of the income and that this passed. This argument was apparently not made use of before the Special Commissioners because their judgment in favour of Mr. Allan deals not with the income but with the whole share capital. In the case as stated I find no distinction as to mere income.

Further, the evidence of Mr. Allan's original intention as regards these shares is not limited to the dividends from them but to the whole capital itself without distinction between capital and income. The case on this is stated as follows :—

" Prior to the said directors' meeting the Respondent " informed his wife that he was going to transfer the said " shares into joint names of his wife and himself as part " of the said trust fund, and that in the meantime and " until such transaction was completed he would himself " hold the said shares upon trust."

Dealing with the capital alone, he proceeded on 22nd February 1917 to get authority from the board of directors to complete the intended transfer of the shares, but during the period under review no steps were taken to carry this into execution.

It is well settled that equity will not in favour of a volunteer execute an imperfect gift. Donatio mortis causa is the only exception to this rule. See *Porter* v. *Walsh* (1). For the law generally see *Milroy* v. *Lord* (2), *Heartley* v. *Nicholson* (3).

If the matter rested there I am of opinion at no time during the period in question could the beneficiaries, Mrs. Allan or her daughter, have compelled Mr. Allan to carry out his intention. I cite *Milroy v. Lord* (2) as establishing the proposition that where the gift is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust. Here, apparently pending transfer, the testator retained the scrip in his own possession, while naturally the stock remained in his own name.

(1) 1 I. R. [1895,] p. 284. (2) 4 De G. F. & J., p. 264.
(3) L. R. 19 Eq. p. 233.

The Commissioners have, however, found that there was a special declaration of trust by Mr. Allan pending the transfer of the shares in his name to the Trustees. We are not told in terms what the trust was and we are not told at what precise period Mr. Allan used the cabalistic formula of a declaration of trust which raises the question as to whether this case is governed by the judgment in *Milroy* v. *Lord* (1), and without which his property would remain taxable. The Commissioners, however, believing him to be a man of veracity and honour, which I do not for a moment impugn, have accepted his statement that this declaration by parol of some trust was made, at some time prior to the assent to the transfer given by the Board, and of course it is not impossible that in law in certain circumstances a valid declaration of trust could be made. But what is the effect of this in the present case? I think it is plain what the trust really was. It was admittedly only a temporary one. In my opinion the shares were impressed with a trust on the part of Mr. Allan to legally transfer them to the trustees as soon as he could do so. That was the real trust, and it is borne out by all the circumstances in the case. I consider that I must look at the whole transaction. Such a transfer was always the intention, and, in my opinion, the making of it was the primary, paramount and over-riding intention, and an explanation is actually given in the documents before us of the reason for its non-fulfilment forthwith. If this was the intention, as I believe it was, then, temporary trust notwithstanding, the gift remained incomplete till the intention was carried out, and equity cannot aid the defect in the intention in favour of a volunteer.

If Mr. Allan intended to pass the beneficial interest in the shares by his declaration of trust, so constituting himself a trustee by a valid declaration, he could have done so absolutely and not temporarily, and there was no urgent necessity to do anything more. He could, and as trustee should, have applied the dividends as he saw fit and either handed over or retained the scrip. But quoting the words of Turner, L.J., in

(1) 4 De. G. F. & J. 264

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Milroy v. *Lord* (1): "The cases go to this extent that if "the settlement is intended to be effectuated by one of "the modes to which I have referred the court will not "give effect to it by applying another of these modes. "If it is intended to take effect by transfer the court will "not hold the intended transfer to operate as a declara- "tion of trust, for then every imperfect instrument "would be made effectual by being converted into a "perfect trust." This passage is quoted with approval by Sir George Jessell in his Judgment in Richards v. *Delbridge* (2).

The difficulty in the present case arises from the fact that on the Respondent's contention the donor appears to have used for different periods not one of the modes referred to by Turner, L.J., but two of them. The Lord Justice only appears to contemplate the failure of one of them. The result of the donor's action is that No. 1 mode, read as an absolute declaration of trust as the Respondent argues would enable the fund to escape taxation for the years sued for without No. 2 at all, whereas No. 2 (the uncompleted transfer) without No. 1 would render him still liable. Reading No. 1 as I read it, the two modes are not inconsistent and he remains liable.

In this state of affairs I think it is our duty as I have said, to look at what was the paramount intention of the donor in the whole transaction. I am of opinion that it was to vest the shares by legal transfer in the names of himself and his wife as joint trustees as the other securities had been vested by purchase, and that if for the years in question he omitted to do so, although a trustee for the purpose of doing so, the gift in consequence remained imperfect and the property in the shares remained his own, subject to his intention only and not to a valid trust, equivalent to an equitable transfer, which would have bound it.

I do not think, therefore, that the so-called declaration of trust, reading it as I have read it, could have been enforced against him by his wife and daughter had he subsequently made the case that his real intention was to

(1) 4 De G. F. & J. at p. 274 (2) L.R. 18 Eq. 11 at p. 15

make a legal gift of the shares but had changed his mind and had he chosen he might have revoked the gift at any time before the transfer by deed of the shares.

The question of the dividends is in some way connected with this because the Special Commissioners, as the case is stated, appear to have considered that the dealing with the dividends amounted to some evidence of an equitable assignment of the capital, and that from the date of the matters next mentioned the property in the whole capital passed from Mr. Allan.

It appears by the Case stated, that, following the authorization of the proposed transfer at the Board Meeting an account was opened in the books of Messrs. Workman & Clark for "C. E. Allan and Mrs. J. G. Allan, Trustees of Miss M. S. Allan" and it further appears that from that date all dividends accruing in respect of the shares were paid into this new account by the Company. In my opinion there is nothing in this to implement the intention to transfer the capital share fund by regular assignment. But how far is it evidence of a separate trust for income? As I have said on the evidence no separate trust for income was ever declared. In my opinion the firm were acting as bankers for Mr. Allan which they were not bound to be. It was their duty prima facie to pay him his dividends as they accrued on his own share capital. Instead of that they act on an order from him to pay the dividends to himself and another as they accrued. He continued to have full control over the income arising from what I have held remained his own property and, though he did not do so, he could so far as the company was concerned have revoked the direction or order to pay given to the company at any moment up to the date of registration with them of the intended transfer. That he did not do so does not affect the question of his right and power to do so had he wished, and this goes to the root of the question, whether or not the income on his own capital remained his property subject to a trust and certainly an intention to transfer the capital; or had he absolutely divested himself of the right to deal with it? In my opinion, in the foregoing circumstances he had not done so, and, therefore, for the period

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in question he should be treated as owner, with an unenforceable duty on him to transfer, as I think in fact he was.

We therefore think that the question should be answered thus, that the Special Commissioners were correct in their determination as to the first three sums mentioned but not as to the Workman & Clark shares, the dividends on which formed part of the Respondent's income.

The order of the King's Bench Division will be varied. As each of the parties have succeeded in part and failed in part, we order that each do abide their own costs in the King's Bench Division and in this court.

ANDREWS L.J. The question to be determined in this case is whether the interest arising from the £1,500 Exchequer Bonds, £4,500 and £10,000 War Loan, and the shares of Workman & Clark Limited formed part of the income of the Respondent for the financial years 1917-1918 and 1918-1919 so as to be included in the computation of his total income for the purposes of supertax under the provisions of Section 66 of the Finance (1909-10) Act, 1910. As all the bonds, stock and shares were either purchased with his own money, or were otherwise his own absolute property, it is obvious that the interest derived therefrom was properly included in an Assessment of the Respondent's total income unless by valid gift or declaration of trust he had ceased to be the beneficial owner of the dividends prior to the commencement of the financial years referred to.

For the law applicable to valid voluntary settlements it is not necessary to look further back than the authoritative judgment of Turner, L.J., in *Milroy* v. *Lord* (1):—"I take the law," he says, "of this court to be well settled that in order to render a voluntary settlement valid and effectual the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be

(1) 4 De G. F. & J. 274.

effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes, (i.e. of the settlement), and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol, but in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

This statement of the law has been frequently approved of, and, with perhaps two exceptions, has never been seriously challenged in any subsequent case. In *Warriner* v. *Rogers* (1) Sir James Bacon, V.C., briefly expresses the same principle thus:—"The rule of law upon this subject I take to be very clear, and with the exception of two cases, which have been referred to, the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest."

The two cases referred to—*Richardson* v. *Richardson* (2) and *Morgan* v. *Malleson* (3)—were subsequently disapproved of by Sir George Jessel, M.R., in *Richards* v. *Delbridge* (4), and in my opinion they cannot now be accepted as sound law. After considering them Sir George Jessel, M.R., states his view of the law in terms which differ only in the language used

(1) L.R. 16, Eq. at p. 348.
(2) L.R. 3, Eq. 686.
(3) L.R. 10, Eq. 475.
(4) L.R. 18, Eq. 11.

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from the statements which I have already cited:—"The principle," he says, "is a very simple one. A man may transfer his property without valuable consideration in one of two ways, he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust constitute himself a trustee and without an actual transfer of the legal title may so deal with the property as to deprive himself of its beneficial ownership and declare that he will hold it from that time forward on trust for the other person." Later on in his judgment he considers these two ways of transferring property without valuable consideration, and adds:—"The distinction appears to me to be plain and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose fiduciary or otherwise."

These two methods of transferring such property are, it should be added, wholly distinct from one another, indeed, if applicable to the same period of time, inconsistent with one another, and as a consequence an imperfect or incomplete transfer or gift can never be treated by the court as a valid declaration of trust. A person who intended to transfer but never actually transferred, cannot, if there be nothing more, be treated as a trustee, thereby assuming an office with its incidental responsibilities, which he never intended to hold. There is, however, one feature common to the two methods, namely, that in both cases the donor or grantor must have by complete gift or transfer in the one case, or by acts which admit of no other interpretation in the other case, parted with the beneficial interest in the subject matter of the gift. The donor must denude himself and part with the whole control over the fund. Everything must have been done to make either the legal transfer or the declaration of trust complete.

In applying these principles to the facts of the present case we turn first to the £1,500 Exchequer Bonds and to the £4,500 and £10,000 War Loan. These securities were respectively bought by the Respondent out of his own moneys and registered in the names of himself and his wife on 12th December, 1916, 17th February 1917, and 12th June 1917. The purchases were, as appears in the case, made in fulfilment of a prior promise made by the Respondent to his wife that he was going to create a trust fund for her benefit, and that of her daughter, and that with that object he was going to make the purchases in their joint names. The Respondent informed his wife of the purchases after they had been made, and has not personally received any portion of the income therefrom. Indeed, in my view he could not in the circumstances have received any such income and applied the same for his own purposes without committing a breach of trust. The Bonds and Stock were never his own from the day of their purchase. They always stood in the joint names of himself and his wife, impressed with the trust in favour of his wife and daughter which he had previously declared. The legal title to the moneys had been transferred to the trustees when the securities were purchased, and he had parted with all control over the fund otherwise than as one of two trustees, whose duty it was to apply the income for the years in question in accordance with the trust which he had declared, the terms of which no doubt with somewhat greater particularity, are to be found in the Settlement subsequently executed on 29th April, 1919. I, accordingly, agree that the finding of the Commissioners and of the King's Bench Division in reference to the interest derived from these funds should be affirmed.

The facts relating to the Workman & Clark Shares call for separate consideration. On and prior to 22nd February, 1917, these Shares stood in the name and were the exclusive property of the Respondent. On that day he applied at a meeting of the directors for a transfer of the Shares from his own name into the names of himself and his wife, trustees of Miss Monica S. Allan. It appears from the case that he stated on that occasion that he held the shares on trust, and the Minutes of the meeting show

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that the transfer was duly authorized. In pursuance of such authority an Account was on 1st March 1917, opened by the direction of the Respondent in the Company's Books in the names of "C. E. Allan and Mrs. J. G. Allan, Trustees of Miss M. S. Allan." All dividends were from that date paid into the Trustee Account, and none of them has since been received by the Respondent, or applied by him for his own purposes. Owing, however, as is alleged, to the legal delay referred to in the case, the actual transfer of the Shares was not perfected until 31st March 1919, the end of the second financial year with which we are concerned.

If the matter rested here there could be no doubt that the dividends in question would necessarily be treated in law as part of the income of the Respondent, for, the legal transfer not having been completed when the dividends became payable, the court would not hold the intended transfer to operate as a declaration of trust. The donor having intended to effectuate the settlement by one of the recognised modes to which I have referred, the court would not render it effectual by applying another of these modes.

The only doubt which has arisen in my mind has been created by the statement in the case that prior to the directors' meeting referred to, the Respondent informed his wife that he was going to transfer the said shares into the joint names of himself and his wife as part of the said trust fund (thereinbefore referred to as being for her benefit and that of her daughter), and that in the meantime, and until such transfer was completed he would himself hold the said shares upon trust.

If I were satisfied that the trust upon which the Respondent so declared that he would hold the shares pending transfer necessarily meant the same trust as he had previously declared of the "trust fund," namely, for the benefit of his wife and daughter, I would be prepared to give effect to the declaration of trust, for, as Sir James Bacon, V.C., points out in *Heartley* v. *Nicholson* (1), "it is not impossible that an intending donor may by acts or words in addition to and independent of an imperfect gift have constituted

(1) L.R. 19, Eq. at p. 242.

himself a trustee." But one can feel no confidence in the matter. Everything is left vague and indefinite. My colleague, Moore, L.J., considers it is quite plain what the trust really was, namely, that the Respondent would legally transfer the shares to the trustees as soon as he could do so. This may be correct, but personally I do not feel the same measure of confidence in expressing my opinion on the matter. It seems to me that the Respondent in declaring a trust pending transfer may have been intending to impress the shares with the same trust as is declared in the case of "the trust fund." If I were satisfied as to this I would be prepared to uphold the judgment of the King's Bench Division on the point; but I am not so satisfied; it is all mere speculation. One thing which makes me doubt if the impressed trust was the same as that of the trust fund is that, whilst the latter is stated in the case to have been for the benefit of the Respondent's wife and daughter, the terms of the directors' resolution of 22nd February 1917 and the Title of the account opened in Workman & Clark's Books suggest that the wife's interest in the shares was, for the time being at least, that of a trustee only, and that the sole beneficiary of the shares under the trust was the Respondent's daughter.

In the circumstances to which I have referred I find it impossible to say with confidence that the Respondent had, pending transfer, parted with the beneficial interest in the shares by acts which admit of no other interpretation, or that everything had been done to make the declaration of trust complete, both of which are, as above pointed out, essential conditions of a valid declaration of trust.

I have only to add that when regard is had to the terms of articles 15 and 26 of the articles of association of the company, under which the company are not bound to recognise any equitable interest in a share, or any other right in respect of a share than an absolute right in the person registered in respect thereof, it seems to me that it is quite impossible to say that the Respondent had, in the financial years with which we are concerned, denuded himself and parted with the whole control over either the capital or income of the shares. In my opinion the company could not pending transfer have declined to pay

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any accruing dividends on the shares to the Respondent had he demanded same; and, having regard to the vague terms and indefinite character of the parol trust referred to, no suit could have been maintained against him by either his wife or daughter in respect thereof.

For the reasons stated I agree with Moore L.J., that the finding of the King's Bench Division in respect of these shares must be reversed, and that the dividends thereon must be included in the computation of the Respondent's income for Super-tax purposes for the years 1917-18 and 1918-19.

1925 Jan. 20

Charles Edward Allan appealed to the House of Lords (1).

A. C. Clauson K.C. (of the English Bar), *J. M. Whitaker K.C.* (of the Irish Bar), and *A. Black* (of the Irish Bar) for the appellant Charles Edward Allan.

Richard Best K.C. Attorney-General (N.I.) (of the Irish Bar), *J. C. Davison* (of the Irish Bar), and *Reginald Hills* (of the English Bar) for the respondents the Commissioners of Inland Revenue.

At the conclusion of the argument on behalf of the Appellant, Counsel appearing for the Respondents not being called upon, their Lordships delivered Judgment as follows:

VISCOUNT CAVE, C. My Lords, the question to be determined on this appeal is whether the dividends which accrued on certain shares in a well-known company—Messrs. Workman, Clark and Company Limited—during the tax years 1917-18 and 1918-19, ought, for the purposes of Super-tax to be treated as part of the income of the Appellant, Mr. Allan.

The facts are found by the Commissioners in a Case Stated, and the material parts of their statement are to be found in paragraph 3 of the Case. They are shortly as follows: As early as August, 1916, the Appellant, who had no marriage settlement, decided to make provision for his wife and his infant daughter. A draft deed for that purpose was submitted to him in January, 1917, but owing to various circumstances—including the illness of his former solicitor and the absence on active service of his

(1) Lords Present: Viscount Cave, C., Lord Dunedin, Lord Atkinson, Lord Sumner, Lord Buckmaster.

then solicitor—the deed was not completed until the 29th April, 1919, that is to say, until a date after the end of the second of the two tax years in question. When the deed was executed, the effect of it was that the Appellant and his wife were to be trustees of certain shares and securities, and were to hold those trust funds, as to one half in trust for the wife for life (subject to a discretion given to the trustees) and after her death upon the trusts of the second moiety, and, as to the other half in trust for the daughter and the other children, if any, of the marriage, on certain contingencies which I need not specify. Among the shares and securities so settled were these shares in Workman, Clark and Company, Limited. The Case further states that in February, 1917, or thereabouts, certain transactions took place upon which the Appellant relies. At a directors' meeting of the company held on the 22nd February, 1917, the Appellant told the Board that he was a trustee of these shares and asked for their approval to the transfer of them to himself and Mrs. Allan as trustees for their daughter, Miss Monica Allan. The Board gave the authority, and, although no transfer was actually made or presented and the shares remained in the Appellant's name, the dividends were thenceforth paid into an account of those two person as trustees for the daughter. Then the Case says this: "Prior to the said directors' meeting the Respondent (the present Appellant) informed his wife that he was going to transfer the said shares into the joint names of himself and his wife as part of the said trust fund and that in the meantime and until such transfer was completed he would himself hold the said shares upon trust." It is added that since that date the Respondent did not receive any dividends on the shares nor did the wife receive any dividends, but they were accumulated and placed to the credit of the trustees' account.

Upon these facts the Commissioners stated their opinion that the present Appellant's declaration of his intention, coupled with his actions, was sufficient to prove a valid declaration of trust of the shares, and, accordingly, that the dividends were not part of his income for the purpose of Super-tax. That decision was affirmed by the King's Bench Division in Northern Ireland but was reversed by the Court of Appeal, and it is against the decision of the Court of Appeal that the present appeal is brought.

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Viscount Cave C.

My Lords, from this statement it is plain that the real question is whether the declaration which is found by the Commissioners to have been made by the Appellant to his wife in February, 1917, when considered together with his subsequent actions, was sufficient immediately to deprive him of his beneficial interest in the shares in question and the dividends thereon, and to impress them with a valid trust in favour of some other person or persons. The law is clear, that a trust cannot be created by an incomplete transfer but can be created by a complete and unequivocal declaration of trust; and the point is whether there was here such a declaration.

My Lords, it is admitted that the deed did not create the necessary trust, partly because it was not executed until after the material period had elapsed, and partly because by a clause in that deed (Clause 9) it was provided that the deed should not affect any trust property therein mentioned until the date of its becoming vested in the trustees, and these shares did not become vested in the trustees until some time in March, 1919. The whole case therefore turns upon the effect and meaning of the parol declaration found by the Commissioners to have been made by the Appellant to his wife.

What then did that declaration mean? The exact terms of it are not given, and in this respect the statement of facts is somewhat vague and ambiguous. It is suggested on behalf of the Appellant that the effect of the declaration was to make Mr. Allan a trustee of these shares for his wife and his daughter absolutely and in equal shares. My Lords, I do not think it is possible to put that interpretation upon the declaration. The Appellant, Mr. Allan, at that date had in his pocket or in his possession a draft settlement of these shares which he, as it is found, intended to make—a settlement which, whatever its exact form, was plainly inconsistent with a declaration of trust for his wife and daughter absolutely. Further, the fact that two years afterwards he executed a deed wholly inconsistent with any such absolute trust for the wife and daughter cannot be put out of account. Reading all the facts as found by the Commissioners, I do not think it possible to infer that he meant at this period, namely in February, 1917, to declare an absolute trust for his wife

and daughter. Lord Justice Moore put a different interpretation upon the statement, for he thought that the intention and effect of the declaration was to impress the shares with a trust on the part of Mr. Allan to legally transfer them to the trustees as soon as he could do so. I am not sure that I entirely agree with that interpretation. It appears to me that, putting the matter as high as possible for the Appellant, the declaration came to this: The Appellant, Mr. Allan, in effect said to his wife "I intend to settle these shares upon you and our daughter; it may take some time to complete the settlement, but in the meantime until the settlement is made I will consider myself a trustee of the shares, that is to say, I will not deal with them as my own and I will at the proper time transfer them to the trustees of the settlement upon the trusts which I may then declare." I am not sure that that construction is right; but at all events it gives an intelligible meaning to the Appellant's statement that he would hold the shares in trust and is consistent with the other facts of the case. But it is clearly not sufficient to enable the Appellant to succeed in this appeal, for such a declaration left it open to him to frame and mould the trust at some future time as he might then think fit; it was not an immediate and complete declaration of trust, but merely a declaration of his intention to settle the shares and of his intention meantime to keep them in medio, so that they might be ready when the trust was effectively declared.

This view of the transaction is, I think, confirmed by the fact that for upwards of two years after the date when the statement was made the dividends were paid into a trust account and were not divided among the beneficiaries; no part of them was paid to the settlor's wife, but they were accumulated in the trustees names, clearly in order that they might be dealt with according to the settlement as ultimately framed. At all events, I think that is the real meaning of the transaction; and, if so, there was plainly no definite and established trust in February 1917, or at any later time before the deed was executed. During that time the settlor was at liberty either to alter the draft deed or to change his mind and to make no settlement at all, and neither his wife nor his daughter, nor anyone on their behalf, could, I think, have enforced the alleged trust.

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I will only add that, on the Appellant's own showing, a serious question would arise whether what is in his view his wife's moiety of this income ought not to be brought into account for the purpose of assessing the Super-tax payable by him.

My Lords, I come to the conclusion that there was no effective trust declared of this income in February 1917, that it remained the income of the Appellant, and, accordingly, that the decision of the Court of Appeal was right and this appeal ought to be dismissed with costs.

LORD DUNEDIN. My Lords, I concur. I think the whole transaction was inchoate until 1919, and up to that date these dividends legally belonged to Mr. Allan.

LORD ATKINSON. My Lords, I concur.

LORD SUMNER. My Lords, I concur.

LORD BUCKMASTER. My Lords, that property to which a title can be established at law is incapable of being voluntarily transferred by verbal declaration is well known, and no volunteer can come into a court of equity and ask that an intention that property was to be transferred, however plain and explicit, should be perfected by the assistance of the court. But it is also true that while the legal ownership remains unaltered it is possible that it may be impressed in the hands of the legal owner with a valid declaration of trust in favour of third parties. How far it is possible that such a declaration of trust should involve the intricacies of a complicated settlement I will not pause to inquire. It would appear that in principle it might be done if it were possible to show that the declaration had been sufficiently detailed and specific to cover all the varying conditions which such a settlement might contain. But one thing at least is plain, that, whether the property of which the trust is declared is property which it is intended should be held so that the whole beneficial interest passes in favour of the cestuique trust, or whether it is intended that there should be partial interests created while the legal ownership remains unaltered, it is essential that something should be shown more than an expressed intention that a thing is going to be done instead of an actual declaration that the trust has been made perfect.

My Lords, applying these principles to the present case I find this: The shares in Messrs. Workman, Clark and Company, Limited, which are the only subject matter of this appeal, were declared by the Commissioners for Special Purposes of the Income Tax to be bound by a verbal trust, stated in two paragraphs of the Special Case to have been constituted in this way. At some time in December, 1916, Mr. Allan, the Appellant, was proposing to purchase certain Exchequer Bonds for the benefit of himself and his wife and daughter; he then stated to his wife " that he was going to create a trust fund for her benefit and that of their daughter, and with that object was going to purchase the said Exchequer Bonds and War Loan in their joint names, same when so purchased were to be held by them upon trust for her and her daughter." I will assume, although it appears to me that the matter is open to argument, that such a declaration would establish a valid trust of those War Bonds, when purchased, in favour of the wife and the daughter, but, if that were so, the trust that would follow would be a trust holding those War Bonds for the daughter and the wife in equal shares. The only other reference to a verbal declaration is to be found in another paragraph of the Case where the Appellant just before a directors' meeting of Workman, Clark and Company, which was held on the 22nd February, 1917, told his wife " that he was going to transfer the shares into the joint names of himself and his wife as part of the trust fund, and that in the meantime, and until such transfer was completed, he would himself hold the said shares upon trust," but upon what trust is not defined. Now it appears that at a later date a trust deed was, in fact, executed, which certainly did not carry out a trust declared in favour of the wife and the daughter in equal shares. It was a settlement of the shares, of which one half was to be settled for the benefit of the wife during her life and the remaining half was to be settled upon terms, which it is unnecessary to examine, for the benefit of the then existing daughter and any other daughters that might thereafter be born. It is not suggested that these shares were subject to two trusts—first, the declaration of trust in favour of the wife and the daughter, which made them the absolute owners in equal shares,

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and, secondly, the trust effected by the deed, which, it is said, has created different trusts in violation of the first, and which counsel for the appellant bravely, but quite accurately, argued were so inconsistent that they ceased to bind the beneficiaries under the earlier trust. My Lords, that is not the view I take of the transaction: nor is it, as I read the Case of the Special Commissioners, the view that they took of the transaction. The view that they took of the transaction was, in my opinion, that the deed did nothing but carry into effect the expressed intention of the settlor made at the earlier dates. If that were so, then in my opinion the verbal statement made here of the trust which was purported to be declared was wholly inadequate to effect any such change of property. The consequence is that, so far as these shares, at least, were concerned, there is no proof of any valid verbal declaration of trust depriving the settlor of the enjoyment of the property in those shares up to the time when the deed was executed.

My Lords, for these reasons I am of opinion that this appeal should be dismissed with costs.

QUESTIONS PUT.

That the Order appealed from be reversed.
The Not Contents have it.

That the Order appealed from be affirmed and this Appeal dismissed with costs.
The Contents have it.

Solicitor for the appellant: *Martin & Co.*, for *M'Lean & Son*, Belfast.

Solicitor for the respondents: *Solicitor of Inland Revenue.*

[IN THE COURT OF APPEAL.]

THE MARTIN ESTATES COMPANY LIMITED

V.

WATT AND HUNTER (1).

(1924, No. 3088).

Appeal 1925

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MARTIN ESTATES v WATT & HUNTER

Landlord and Tenant—Recovery of Possession—"Dwelling-house" —Premises built and used as a Constabulary Barracks— Premises used " for the Public Service "—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), Sect. 5, Sect. 12, Sub-s. 2, Section 13, Sub-s. 1.

Certain premises known as the C. Police Barracks were demised by lease of 18th March, 1903, to Sir N. C. as Receiver for the Constabulary Force in Ireland, for the public service, for the term of twenty-one years from January 1st, 1903. The premises were built and had always been used as a Constabulary Barracks. The rights vested in the lessee of the premises subsequently became vested in the defendant S.W. as receiver for the Royal Ulster Constabulary.

In an action for recovery of possession of the premises, the defendants claimed to be entitled to retain possession of them on the ground that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied. Brown J. held that the premises were primarily used as a dwelling-house to house the police of the district and that the defendants were protected by the Act and gave judgment accordingly.

Held by the Court of Appeal (Moore and Andrews, L.JJ.) reversing the judgment of Brown J. that a tenant is not entitled to the protection of the Act unless he is in actual occupation, either personally or by his servant or agent, of the dwelling-house in respect of which an ejectment is brought, and that the defendant Watt was not in such occupation; and held also that to come within the Act, the premises, of which possession is sought must be a house, or part of a house let as a separate dwelling, and that the premises were not so let.

APPEAL from the judgment of Brown J., sitting without a jury, in an action for the possession of certain premises between the plaintiffs the Martin Estates Company Limited, and the defendants Samuel Watt the Receiver for the Royal Ulster Constabulary and William Hunter a Police Sergeant residing in the premises.

By Indenture of Lease dated the 18th March 1903 The Martin Estates Company Limited demised to Sir Neville Chamberlain as Receiver for the Constabulary Force of Ireland the premises known as the Cregagh police bar-

(1) In the Court of Appeal before Moore and Andrews, L.JJ.

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racks, adjoining the Cregagh Road, Belfast, for the term of twenty-one years from January 1st 1903 at the yearly rent of £65. It was also provided by the lease that the lessee should hold the premises (in trust for His Majesty his heirs and successors) for the public service. The whole estate and interest of Sir Neville Chamberlain as Receiver for the Constabulary Force of Ireland in the premises subsequently became vested in the defendant Samuel Watt as Receiver for the Royal Ulster Constabulary. The term of twenty-one years for which the lease had been granted, having expired, the plaintiffs instituted proceedings for recovery of possession of the premises, but the defendant Samuel Watt claimed that he was entitled to retain possession on the ground that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied.

It was held by Brown J. that as these premises were primarily used as a dwelling-house, to house the police of the district, the defendants were within the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; he therefore gave judgment for the defendants.

The plaintiffs appealed to the Court of Appeal of Northern Ireland (1).

E. S. Murphy K.C. and *W. Lowry* for the plaintiffs :—

The barracks was let for public purposes and has always been used for such purposes. It was built for a police barracks in 1902. It has always since been used as a police barracks. We submit that the entire house is in fact used for the purposes for which it was built. If the defendant's contention is correct, the Cregagh police barracks was let as a separate dwelling-house. It was decided by Brown J. in the court below that the predominant user was that of a dwelling-house, but we contend that there is no such predominant user. In any case the real test is, how were the premises let, not how were they used. Section 5 sub-s. (1) and section 12 sub-s. (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 should be read together.

(1) In the Court of Appeal before Moore and Andrews L.JJ.

User as a police barracks connotes a certain amount of residence by some persons, but this is not sufficient to bring the premises within the Act.

In *M'Garry* v. *Callaghan* (1) it was held that where a canteen within a barrack was demised to a party, to be held as such for the use and accommodation of the soldiers of the army, subject to the control of the commanding officer and other restrictive clauses, that such building being used for public purposes exclusively, was not liable to the grand jury cess. We rely on *Burns* v. *Radcliffe* (2), a case decided on the general user of the premises. Section 12 sub-s. (2) of the Act omits the words " for the public services " which appear in section 13 sub-s. (1). The time limit fixed for the operation of this last section has since expired. We submit that it necessarily follows from this that premises used " for the public service " fall within section 13 and not within section 12 of the Act, and that section 13 having ceased to operate, the police barracks is excluded from the protection of the Act. The habendum of the lease also uses the words " for the public service," and we submit that full weight should be given to it and to the exact words in the Act.

They also referred to *Ladd* v. *O'Toole* (3), *Clutterbuck* v. *Taylor* (4), and *Nicholson* v. *Mouncey* (5).

Megaw K.C. and *J. C. Davison* for the defendants :—

A police barracks may be a dwelling-house, and can be protected by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It is residence that is intended to be protected by the Act. The barracks itself was a dwelling-house. The police sleep there and live there and use it as their dwelling-house. A barracks is principally a dwelling-house for the police. A definition of a dwelling-house is to be found in *Atkinson* v. *Collard* (6).

We rely upon *Burns* v. *Radcliffe* (2), which settled the law on the subject. In *Colls* v. *Parnham* (7) the law is stated very clearly by Salter J. at pages 328-329, where he says: " The Act of 1920 gives great privileges and

(1) 12 I. L.R. 331.
(2) [1923] 2 I.R. 158.
(3) [1904] 2 I.R. 389
(4) [1896] 1 Q.B. 395
(5) 15 East 384
(6) 16 Q B.D. 254
(7) [1922] 1 K.B. 325

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protection to tenants of dwelling-houses, and it expressly provides that the tenant of a dwelling-house is not the less entitled to that protection because part of the house is used for business purposes. The Act by s. 13 further gave privilege and protection, but on a somewhat more restricted scale, to tenants of business premises. It is obvious that premises may be in fact a dwelling-house and at the same time be used for business purposes."

The question to be considered is, are the premises used entirely or very largely as a dwelling-house. The principal user of the barracks was as a place of residence. Barracks is defined in the dictionary as " a set of buildings erected or used as a place of lodgment or residence for troops." In the *Duke of Richmond and Others* v. *Dewar and Others* (1) Scrutton L.J., referring to the law on this subject, said at p. 152 that he thought that " the use of a house for sleeping apartments was one of the main characteristics of a dwelling-house." In the present case all but three rooms were used for living purposes. It was a house built as a dwelling for a considerable number of people.

A tenant can occupy premises himself or through his agents *Duke of Richmond and Others* v. *Dewar and Others* (1). The police were in actual occupation at the time the lease was executed. The barracks regulations are entirely in our favour, showing as they do that the building was intended to be used as a dwelling-house. The cases establish that if the building is a dwelling-house, it is of no consequence that it is also used for other purposes. The paramount object of the Act was to protect those who were within the status quo. The object of section 13 was to extend the protection of the Act to stores and buildings used for governmental purposes, but the fact that this section has ceased to operate cannot be regarded as in any way minimizing or destroying the rights to which we are entitled under section 12 *Callaghan* v. *Bristowe* (2) is strongly in our favour.

Unless these cases are all wrongly decided we submit that the defendants must succeed, as the building was let solely as a residence for the police. We submit that *Duke of Richmond and Others* v. *Dewar and Others* (1) and *Callaghan* v. *Bristowe* (2) establish the proposition

(1) 38 T.L.R. 151 (2) 89 L.J. (K.B.) 817.

that it is not necessary that the tenant should be in actual physical occupation, but may be in possession through his agents. It is not necessary for us to bring in the words "for the public service," as the words used in section 5 sub-s. (1) (d) are sufficient for us. We submit that where a dwelling-house is used for public purposes section 12 applies and that where it is a case of a building which is not a dwelling-house but is used for public purposes section 13 applied.

[They also referred to *Collis* v. *Flower* (1).]

E. S. Murphy K.C. (in reply):—

Cur. adv. vult. Feb. 3

MOORE, L.J.: This was an action of ejectment by the Martin Estates Company Limited, and the defendants were Samuel Watt and William Hunter. The statement of claim sought for possession of the lands demised by a lease of the 18th day of March, 1903, made between the plaintiffs of the one part and Sir Neville Chamberlain of the other part for twenty-one years from the 1st day of January, 1903, on the ground that the term had expired. The lease was made to Sir Neville Chamberlain as Receiver for the Constabulary Force of Ireland, and the defendant, Samuel Watt, is now the Receiver for the Royal Ulster Constabulary, and it was conceded that he represented all the interests of Sir Neville Chamberlain. The defendant, William Hunter, was a Police Sergeant residing on the premises which were used as a constabulary barracks in the performance of his duty. No relief was claimed against him in the statement of claim, and he was to all intents and purposes dropped out of the action.

The lease in question purported to demise all those the house and premises situate as described and used as a constabulary barracks to hold the said house and premises with the appurtenances thereunto belonging unto the lessee "in trust for His Majesty his heirs and successors for the public service for the term of twenty-one years to be computed from the 1st day of January, 1903," at the yearly rent of £65 0s 0d. The lease contained the usual covenants and also provided "that at any time during the continuance or at the termination of this demise it shall be lawful for the lessee to remove or cause to be removed all racks for guns or arms or any other fixtures which may

(1) [1921] 1 K.B. 409.

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have been put up in the said house and premises by the said Constabulary Force."

The premises are locally known as the Cregagh police barracks and have been used as a constabulary barrack from the date of the Lease up to the present. The defendant claims that by virtue of the provisions of the Increase of Rent and Mortgage interest (Restrictions) Act, 1920, no order for possession could be made.

Mr. Justice Brown, who tried the action without a jury, held that the premises had been let as a dwelling-house for the police on duty in the district, and gave judgment for the defendant with costs. In these circumstances the appeal came before us. Two questions have been argued before us:—First, is the barracks used by the police a dwelling-house within the meaning of the Increase of Rent Act, 1920? and second, is the defendant, Watt, a tenant within the meaning of the Act?

If either of these questions is negatived, the plaintiffs succeed. In the original Act of 1915 (5 & 6 Geo. 5, c. 97) the definition of tenant, sec. 2, sub-section (d) "includes any person from time to time deriving title under the original tenant," and this definition remained unchanged after the passing of the two Acts of 1919, 9 & 10 Geo. 5, c. 7, and 9 & 10 Geo. 5, c. 90. This was the law until the passing of the Act of 1920 (10 & 11 Geo. 5, c. 17). This actually repealed the Acts of 1915 and 1919, and the Act of 1920 is now "the Principal Act," but by section 12, sub-section 1 (f) the above definition of tenant was re-enacted and the following was added to it (g):—"tenant includes the widow of a tenant dying intestate, who was residing with him at the time of his death, or where a tenant dying leaving no widow, or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the County Court."

Statutes, as we all know, were successively passed to protect the dwellers in occupation as tenants of small houses from being disturbed in their occupation.

I have used the word "occupation" as illustrating more what I understand by the Statute than the actual

words. The word most frequently used in the Statute is "possession." Now "possession" as enjoyed by the owner of a house property or estate may mean either the user of it by some one else who is a sub-tenant, the rents and profits being received by the owner; or it may equally mean that the user may be exercised by the owner in whole or in part and in lieu of or in addition to mere receipt of profits. "Occupation" means that the owner is in actual physical enjoyment of the house, property or estate by himself, his agents or servants. Strictly speaking, "occupation" by the owner cannot include the case of sub-tenants for the actual occupation is in them. A limited form of occupation is "residence," a word also with "residing" frequently used in the Act. I have had occasion recently to ascertain the meaning of "residence"—see *Moffat* v. *M'Cleary* (1)—but "residence" must involve the dwelling for some period of the year on the premises personally of the owner or his family, or alternatively, at least, of his domestic servants.

In these circumstances we have to consider what is the meaning of "possession" as used in the Statute. It cannot mean "possession" in the sense firstly dealt with because sub-tenants are within the definition of tenant in sec. 12 (1) (g) to the exclusion of the owner or at least in privity with him, and because sub-tenants are within the protection for tenants—under sec. 5 (5). Sec. 15 relates to the possession by a tenant whose term has expired but who is protected by the Statute, but I think it is plain from sub-sects (2) and (3) that the possession there referred to is occupation.

The Court of Appeal in England in *Keeves* v. *Dean* (2) has decided that a tenant in occupation under this section can not assign the right of occupation, which is purely personal.

With the exception of *Collis* v. *Flower* (3) all the cases I have found have dealt with the case of tenants or persons claiming to be tenants, in actual occupation. *Collis* v. *Flower* (3) was a case under the Act of 1919, but brought after that Act had been amended by the Act of 1920. It was an ejectment by the landlord. The occupier had an inchoate title to the tenancy, because

(1) [1923] 1 I.R., p. 16. (2) [1924] 1 K.B. 685.
(3) [1921] 1 K.B. 409.

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as soon as the other defendant executor of the deceased tenant should have assented to the bequest to her, she had the title as tenant; until then he could put her out. As he had not assented she was never sub-tenant, but in favour of the landlord, as between her and the executor the Court treated the possession as being in the executor with the legal title. I am not, however, prepared to say without further consideration how far I would have agreed with this decision. Bankes, L.J., in *Keeves* v. *Dean* (1) declined to discuss it.

The question, however, has recently come before a Divisional Court consisting of Swift and Acton, JJ. in *Hicks* v. *Scarsdale Brewery Co.* (2) (and I am indebted to my colleague Andrews, L.J. for the reference to it); Swift, J., held that the possession under sec. 5 sub-s. 1 meant actual physical possession of the premises, or "occupation" in the sense I have defined. Acton, J., differed. I prefer the conclusions of Mr. Justice Swift.

Without going so far as to say that "residence" in the legal sense is required, I certainly hold that at least the tenant must be in "occupation" of the premises in the sense in which I have already defined that term. This would cover such cases as a company—reputed to have neither body nor soul—such as the Hotel Company in the *Duke of Richmond and Others* v. *Dewar and Others* (3) case, where the occupation was by the company's servants.

In the present case, the tenant, Mr. Watt, was admittedly not in occupation of the barracks by himself, nor was he in possession by his servants or agents, for, as Mr. Murphy has pointed out, the police are servants of the Crown. I therefore hold that not being in occupation he is not a tenant to whom the Act applies.

I concur further with the view that in no sense is a house let for public service and inhabited by public servants a dwelling-house within the Act of 1920, and, if necessary, I would apply this opinion equally to the case of a patient in a hospital vested in a committee but supported by rates or an inmate of a jail vested in a Prisons' Board but supported by rates and taxes. These people patients and inmates alike do dwell there for longer or

(1) [1924] 1 K.B., 685. (2) [1924] W.N. 189
(3) 38 T.L.R. 151.

shorter periods under the statutory owners, but it would be a perversion of language to describe either of such institutions, public in their nature, as a dwelling-house to be protected under this Statute.

I think the plaintiffs should to some extent be indemnified against the costs of contesting this claim for relief raised by a State Department with all the resources of Government, and, considering the importance of the case, I would willingly listen to any application that their costs should be taxed on the higher scale.

The judgment should be set aside, and judgment for possession, with costs of the action and of this appeal to be taxed, should be entered for the plaintiffs.

ANDREWS, L.J.: I entirely agree with Lord Justice Moore that a tenant is not entitled to the protection afforded by the Increase of Rent Act, 1920, unless he is in actual occupation of the dwelling-house in respect of which the ejectment is brought either personally or by his servant or agent; and I further agree on the authority of *O'Byrne* v. *Marquis of Hartington and Others* (1) and *Nicholson* v. *Mouncey* (2) that Mr. Watt, the Receiver for the Constabulary, was not in such occupation. This part of the case has been so fully dealt with by my colleague that I feel it unnecessary to add anything to what he has said in regard to it.

I wish, however, to base my judgment further on the simple ground so clearly and strenuously advanced by Mr. Murphy. To come within the Act the premises, possession of which it is sought to recover, must be a house or a part of a house let as a separate dwelling; and, in my opinion, it is quite clear on the terms of the lease of 18th March, 1903, that these premises were not let as a dwelling at all. Under S. 13, the provisions of which have now expired, the character of premises may be determined by user; but premises can only be given the character of a dwelling-house under section 12 by the terms of the letting. It would be, in my opinion, an abuse of language to say that these premises were "let as a dwelling-house." Built in 1902 by the plaintiff company as constabulary barracks, they were demised on 18th March, 1903, to Sir Neville Chamberlain, as Receiver for the

(1) I.R. 11 C.L. 445. (2) 15 East 384

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Constabulary Force in Ireland, in trust for His Majesty, his heirs and successors for the public service for the term of twenty-one years. Mr. Megaw for the defendant contends that barracks may be a dwelling-house, and that in the present case the whole barracks, including the guard-room, the sergeant's office and the explosives room, constituted a dwelling-house. No doubt some of the police stationed in the barracks have been living and sleeping in it. It may be that this is in accordance with custom; but I refuse to subscribe to the contention that a letting of premises to the Receiver of the Constabulary "for the public service" necessarily connotes such a residence therein as to constitute the premises a dwelling-house. When I put the question to the defendants' counsel during the argument I did not understand him to contend that the landlords could have taken any action for recovery of possession during the currency of the lease based on the breach of express or implied covenant if the constabulary had ceased to reside therein and had utilised the whole premises for storage of rifles, tunics, or other police equipment. There is nothing in the lease which, in my opinion, compels residence on the premises. The only condition is user by the police for the public service.

I wish to add a few words as to the importance which, in my opinion, attaches to the use in the habendum of the lease of the words "for the public service."

The Act of 1919, following on the lines of the Act of 1915, applied only to dwelling-houses. Then came the decision of the Court of Appeal in England in *Epsom Grand Stand Association* v. *Clarke* (1), to the effect that a public-house in which the defendant and his family and servants continually lived and had their residence was none the less their dwelling-house because it was also a public-house. But as this was not a decision of the highest Court in the land it was thought desirable in passing the Act of 1920 to give it statutory confirmation, and this was accordingly done by the addition of the proviso contained in S. 12 (2) (ii) that the application of the Act to any house or part of a house should not be excluded by reason

(1) 35 T.L.R. 525

only that part of the premises is used as a shop or office or for business, trade, or professional purposes.

Into this same Act was introduced a provision (section 13) extending for the first time the protection of these Acts to business premises subject to certain modifications. The opening words of the section call for special notice :— " This Act shall apply to any premises used for business, trade, or professional purposes, or for the public service, as it applies to a dwelling-house . . . " It will be observed that the words " or for the public service " are placed in this section in conjunction with the words " for business, trade, or professional purposes," whilst they are omitted, and must be assumed to have been deliberately omitted, from section 12 (2) (ii). From this I infer that the legislature recognised that, whilst part of a " dwelling-house " may be used for business, trade, or professional purposes, the remaining part of it may be so occupied by the tenant as his residence, that the premises taken as a whole retain their general character of a dwelling-house. This, however, does not apply to premises used for the public service which fall within S. 13, and not within S. 12 of the Act; and when the time limit fixed for the operation of the former section expired on 24th June, 1921, these premises no longer remained within the protection of the Act.

For these reasons I am of opinion that the judgment of Mr. Justice Brown should be set aside, and that judgment should be entered for the plaintiffs for possession with costs. I only wish to add that I am glad that my view of the law coincides with what I conceive to be the merits and justice of the case.

Solicitors for the plaintiffs: *White, M'Millan, and Wheeler.*

Solicitor for the defendants : *H. H. Mussen.*

J. McC.

Appeal 1924

Nov. 4

TOPPING v HUGHES

[IN THE COURT OF APPEAL.]

TOPPING V. HUGHES (1).

Landlord and Tenant—Recovery of Possession—" Alternative accommodation "—" Available "—Undesirable Tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), sect. 5 (1) (d).

A cottier house situated at Moy, County Tyrone, was let to the defendants on a weekly tenancy, at the rent of three shillings per week. The defendants resided in this house.

In a civil bill ejectment for overholding of the house and premises, the defendants claimed to be entitled to retain possession on the ground that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17) applied.

On appeal by the plaintiff from a dismiss granted by the County Court Judge of Tyrone, Wilson J. held that the Act of 1920 applied and found that the plaintiff reasonably required the dwelling-house for occupation as a residence for himself and that though alternative accommodation reasonably equivalent as regards rent and suitability in all respects were available for a desirable tenant yet the landlady thereof declined to let them to the applicants solely because of what she considered their unreasonable conduct as tenants of the premises sought to be recovered. Wilson J. however stated a case for the opinion of the Court of Appeal, whether alternative accommodation was " available " for the applicants.

Held by the Court of Appeal that the premises came within section 5, sub-s. (1) (d) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), and that the word " available " meant available for the tenant whom it was sought to eject.

CASE STATED for the opinion of His Majesty's Court of Appeal in Northern Ireland under 27 and 28 Vict. c. 99, s. 35 by Wilson J. from the Tyrone Spring Assizes 1924, as follows :—

(1) In the Court of Appeal before Sir Denis Henry, Bart., C.J. and Andrews L.J.

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This was an appeal by the plaintiff from a dismiss without prejudice granted by the County Court Judge of Tyrone of a Civil Bill ejectment for overholding of a certain house and premises in the town of Moy in that County. I refer to the civil bill and dismiss.

I was satisfied that the plaintiff was entitled to a decree for possession of said house and premises save for one point raised by the defence, viz. : Had the plaintiff proved that alternative accommodation reasonably equivalent as regards rent and suitability in all respects is available within the meaning of Sec. 5 (1) (d) of 10 and 11 Geo. V., c. 17.

The plaintiff reasonably required the dwelling-house, &c., for occupation as a residence for himself and I considered it reasonable that judgment for recovery of possession of said dwelling-house and premises should be given to the plaintiff save for the aforesaid point.

The plaintiff and the landlady of two vacant houses in Moy proved to me that alternative accommodation reasonably equivalent as regards rent and suitability in all respects were available, but I was satisfied that the landlady of these two vacant houses would not let either of them to the defendants solely on account of what this landlady considered the unreasonable conduct of the defendants as tenants of the premises now in question.

The plaintiff bought this dwelling house and premises in 1921, subject to defendant's tenancy, and ever since wanted possession of them. The defendants promised to give him up possession in a year's time. They also signed an agreement for a weekly tenancy at 3/- a week. They did not give up possession as promised and sued the plaintiff for rent overpaid and succeeded in recovering same. The defendants also choked up some drain or sewer in their back-yard and induced the sanitary authority to take proceedings against the plaintiff, their landlord, under the Public Health Acts to abate the nuisance caused thereby. The landlady under these circumstances would not let her vacant premises or either of them to the defendants, as she considered—and in my opinion justly considered—that the defendants were not desirable tenants. She was quite willing to let either of her houses to any decent tenant, and the sole reason why she would

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not let either of them to the defendants was their litigious character and conduct aforesaid.

At the request of the parties I agreed to state a case for the opinion of the Court. The plaintiff and the defendants each lodged £5 with the Clerk of the Peace as security for the costs of such case.

The question for the Court is whether or not, in the premises, the plaintiff is entitled to succeed in this civil bill for overholding.

If the Court is of the opinion that the plaintiff is so entitled, there will be a decree for possession, with ten pounds four shillings and sixpence costs and expenses, and the ten pounds lodged in Court by the parties will be paid out to the plaintiff towards the costs of this case stated.

If the Court is of opinion that the plaintiff is not so entitled, the dismiss without prejudice will be affirmed with two pounds thirteen shillings and sixpence costs below and four pounds eleven shillings and ninepence costs of appeal, and the ten pounds lodged in Court as aforesaid will be paid out to the defendants towards their costs of this case stated.

Lowry for the plaintiff :—

The question for decision turns on the meaning of the word " available " in section 5 sub-sec. (1) (d) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. I submit that the word means " vacant," and that it was enough for the plaintiff to prove that there is a suitable house vacant. Otherwise the relation of landlord and tenant would be fixed for ever. The word " available " has received interpretation from Farwell J. in *In re Calverley's Settled Estates* (1). Available means available for a tenant. If a man's character is bad so that no landlord will accept him as a tenant such a man cannot take advantage in this way of his own bad character.

McGuckin for the defendants :—

I submit that it cannot be maintained here that " alternative accommodation, reasonably equivalent as regards rent and suitability in all respects is available " as required by section 5 sub-s. (1) (d) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The

(1) [1904] 1 Ch. 150.

word " available " can have only one meaning and that is available for the tenant.

SIR DENIS HENRY, BART, C.J. [having stated the facts, continued] : It seems to us that the object of this Act was to protect tenants from ejectment. The house which is vacant here is not reasonably " available " for the tenant. We must answer the question put to us in the negative. Accordingly the order made by the County Court Judge of Tyrone dismissing the civil bill will be affirmed with costs in the Court below and of the appeal.

ANDREWS, L.J. : I agree and have nothing to add except to say that I have no doubt that " available " means available for the tenants whom it is sought to eject.

Solicitors for the plaintiff : *Joshua E. Peel & Son.*

Solicitor for the defendants : *John Skeffington.*

J. McC

McGIRR v. DEVINE.

(1924. No. 204.)

Ch. Div. 1925

Wilson, J. Feb. 11.

M'GIRR v. DEVINE.

Local Registration of Title—Agreement to purchase registered lands—Vendor subsequently registered as owner as from date previous to the agreement—Specific Performance—Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict., c. 66). Land Registry Rules of 1910 Order IV., rules 30 & 31.

An agreement in writing was made between the plaintiff and defendant on 29th May, 1924, for the purchase of certain lands. The plaintiff sold as registered owner and the sale was to be completed in June, 1924. The plaintiff did not become registered as owner of the lands until 18th August, 1924, but was then registered as owner as from 8th January, 1924, the date of the original lodgment in the Registry and acceptance of his documents.

Held by Wilson J. that the defendant was not entitled to rescind the contract as the plaintiff was absolutely entitled to be registered as owner as from 8th January, 1924, and on 18th August, 1924 (before time had been made of the essence of the contract) was registered as owner and in a position to convey the lands to the defendant.

TRIAL OF ACTION. By agreement in writing dated the 29th May, 1924, the plaintiff agreed to sell and the defendant to purchase certain lands for the sum of £650. The plaintiff sold as registered owner, subject to equities, the sale to be completed in June, 1924. The plaintiff had bought the farm which was registered in two folios, in October, 1923, from John McGeary, junior, for £600. On 13th November, 1923, the plaintiff was registered as owner subject to equities of the larger portion of the farm and on 8th January, 1924, he lodged his documents to be registered in respect of the smaller portion. The plaintiff was not registered as owner subject to equities of the smaller portion of the farm until 18th August, 1924, but was then registered as owner as of the date 8th January, 1924, when his documents of title had been lodged and accepted. On 24th July, 1924, the defendant refused to complete the purchase on the ground that the plaintiff had no title and was not in fact registered as owner on that date. The defendant had been told in May, 1924, that the plaintiff's papers for registration as owner of the smaller portion of the farm had been lodged in the Local

Registry since 8th January, 1924, but he had not been registered in fact, and the defendant had then stated that he did not object so long as the plaintiff was the real owner.

E. S. Murphy K.C. and *McGuckin* for the plaintiff :—

The plaintiff is now registered as owner as from a date anterior to the date fixed for completion. The plaintiff had good title at the date of completion having lodged all documents for registration and these documents having been accepted by the Registrar in Titles. Order IV., rules 30 and 31 of the Land Registry rules, 1910, show that the date of lodgment of documents with the registrar is the crucial date and in this case the documents had been accepted for registration. There was no defect in title at the date of repudiation, the only further requisite being a ministerial act in the registration office.

The conditions of sale are not confused, misleading or contradictory. There was no confusion in the mind of the purchaser who was informed verbally that registration of one of the farms was pending.

In re White and Hagues' Contract (1) is a decision on the special facts and is not applicable to the present case.

Begley K.C. and *MacDermott* for the defendant :—

We ask for a direction in the defendant's favour on two grounds : first, that the plaintiff has not shown that he had any title at the time of repudiation. It is well settled law that a purchaser on discovering a substantial defect in the vendor's title may repudiate, *Bellamy* v. *Debenham* (2), *In re M'Loughlin and M'Grath's Contract* (3). Here repudiation followed quickly on the discovery of the defect and was prompt. The defect was substantial for the vendor had no interest in the lands contained in folio No. 2994 either at the time of sale or at the time of repudiation.

This follows from the fact that he was not registered as owner until after both these dates and under Sec. 35 (2) of the Local Registration of Title (Ireland) Act, 1891, the instrument of transfer does not confer any estate on the

(1) [1921] 1 I.R. 138.
(2) [1891] 1 Ch. 412.
(3) 48 I.L., T.R. 87

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transferee until he is registered as owner. Subsequent registration could not cure the defect for the title does not not relate back. Sec. 25 only relates to first registration and the fact that the registration is of the day of deposit of the transfer in the registry could not operate to give the vendor any estate in the lands prior to the actual time of registration. *Pim* v. *Coyle* (1).

Second, Clauses 6, 6a and 7 of the Conditions of Sale are similar in form and effect to the clauses considered in *In re White and Hagues' Contract* (2) and on the authority of that decision are confused, contradictory and misleading and being such the purchaser is entitled to be relieved from his contract.

WILSON J. This was an action by the plaintiff as vendor to compel the defendant specifically to perform an agreement for the purchase of a farm of land made by the defendant on the 29th of May, 1924, for the sum of £650.

The plaintiff in October, 1923, had bought the farm, which was registered in two folios from John McGeary, jun., for £600. On 13th November, 1923, the plaintiff was registered as owner (subject to equities) of the larger portion of the farm, and on 8th January, 1924, he lodged his papers to be registered in respect of the smaller portion, and the Registrar in the Local Registry had under the rules noted the day and hour of the lodgment of the papers.

Under the agreement the plaintiff sold as registered owner subject to equities, and the sale was to be completed in June, 1924. Owing to delay in the office the plaintiff was not registered as owner of the smaller portion of the farm in the Register till 18th August, 1924, but was then registered as owner (subject to equities) as of 8th January, 1924—the date of the original lodgment and acceptance of his documents. Requisitions were made in respect of the equities which the plaintiff, without prejudice to his rights under the conditions of sale, answered, and the defendant on the 24th July, 1924, suddenly refused to complete the purchase on the ground that the plaintiff had no title and could not perform his part of the contract not being in fact registered as

(1) [1907] 1 I.R. 330. (2) [1921] 1 I.R. 138

owner on that date, and under the Local Registration of Title (Ireland) Act, 1891, he had no estate in the lands until registered.

The agreement for sale and its execution by the Defendant was duly proved. It was also proved that the defendant was told in May, 1924, that the plaintiff's papers for registration as owner of the smaller portion of the farm had been lodged in the Local Registry since 8th January, 1924, but that he had not been registered in fact though he was entitled to be registered as owner as from 8th January, 1924, and the defendant had then stated that he did not object so long as the plaintiff was the real owner.

No evidence was called on behalf of the defendant, but Mr. Begley K.C. asked me to dismiss the action on two grounds. First, because the defendant was entitled to refuse to complete on 24th July, 1924, as the plaintiff had shown no title to sell, he not being then registered owner of part of the lands sold, and next, relying on *White and Hagues' Contract* (1), because conditions of sale 6, 6a and 7 were confused contradictory and misleading.

I was of opinion that on 24th July, 1924, defendant was not entitled to rescind the contract as time was not of the essence of the contract originally, and no attempt had been made prior to 24th July, 1924, to make time of the essence of the contract. I was also of opinion that the plaintiff was absolutely entitled to be registered as owner in the Registry of Title as from 8th January, 1924, and on 18th August, 1924, before time had been made of the essence of contract, he was so registered and was in a position on and after 18th August, 1924, to convey the farm to the defendant with a good title in accordance with the contract and conditions of sale. Having regard to the contract and conditions of sale and the title contracted for, the conditions of sale were not confused, contradictory, or misleading and the defendant was not entitled to repudiate on that ground. I accordingly order that the contract shall be specifically performed and decree that the plaintiff was on the 18th day of August, 1924, able to give a good title in accordance with the contract and conditions of sale and that the defendant

(1) [1921] 1 I.R. 138

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shall pay the purchase money together with interest thereon from 18th August, 1924, into Court and refer the matter to Chambers to take an apportionment account between the plaintiff and the defendant in accordance with the contract and the above declaration, and also to take an account of the crops on the said lands which came to the hands of or were used by the plaintiff and the values thereof and of all sums properly paid by the plaintiff in saving and looking after the said crops and to ascertain what crops are now in the plaintiff's possession and should be handed over to the defendant, and what balance having regard to the foregoing declarations is now due by the plaintiff to the defendant or the defendant to the plaintiff on the taking of the said accounts. I order that the defendant do pay to the plaintiff his costs of this action to this date when taxed and ascertained and I give liberty to all parties to apply as they may be advised.

Solicitor for the plaintiff: *W. D. Graham.*

Solicitors for the defendant: *Elliott and Clark.*

J McC.

THE KING (SILCOCK)

v

WILLIAM ANDREW BOYD (1).

Licensing Law—Legality of Sale of Groceries on Licensed Premises—Structural Alterations—13 and 14 Geo. 5 (N.I.) c. 12, s. 6.

The defendant, the proprietor of a shop and premises at Straid, Co. Antrim, licensed for the sale of intoxicating liquor for consumption on the premises, on 23rd October, 1924, in the part of the premises in which the sale of intoxicating liquor was carried on, offered for sale a quantity of tea, sugar and other articles of grocery. The premises were not structurally adapted for use nor were they bona fide used exclusively as an hotel or as a refreshment house, railway refreshment room or restaurant.

The defendant was summoned for having carried on a mixed business in his licensed premises after the 1st day of October, 1924.

On the hearing of the summons before two Resident Magistrates at Carrickfergus Petty Sessions on the 18th day of November, 1924, the defendant was convicted and fined ten shillings.

Held, by the Divisional Court on case stated by the Justices pursuant to the Summary Jurisdiction Act, 1857 (20 & 21 Vict., c. 43), that the conviction was correct in law and must be upheld, inasmuch as section 6 sub-section 1 of the Intoxicating Liquor (N.I.) Act, 1923 (13 & 14 Geo. 5, c. 12), provides that nothing shall be sold on licensed premises except intoxicating liquor, tobacco, table waters and food to be consumed on the premises.

CASE STATED for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland by W. T. Hardy, R.M., and George M'Elroy, R.M., from the Carrickfergus Petty Sessions held on the 18th day of November, 1924.

The case stated set out the facts as follows:—

1. At the Carrickfergus Petty Sessions, held on the 18th day of November, 1924, the complainant, who is a District Inspector of the Royal Ulster Constabulary, charged the defendant, who is the proprietor of a shop and licensed premises, that the defendant being a person licensed for the sale of intoxicating liquor for consumption on the premises situate at Straid did on the 23rd day of October, 1924, carry on the business of grocer and did offer for

(1) Before Sir Denis Henry, Bart., C. J. and Brown, J.

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sale a quantity of tea, sugar and other articles of grocery in the part of his said premises in which the sale was carried on, the said premises not being premises structually adapted for use and bona-fide used exclusively as a hotel or as a refreshment house, railway refreshment room or restaurant; contrary to the provisions of section 6 of the Intoxicating Liquor (Northern Ireland) Act, 1923.

2. The facts as proved or admitted were as follows :—

The defendant is the proprietor of premises at Straid, in the County of Antrim, licensed for the sale of intoxicating liquor for consumption on the premises. On the 23rd day of October, 1924, the defendant offered for sale articles of grocery in the part of the premises in which the sale of intoxicating liquor was carried on. The premises were not structurally separated nor were the premises bona-fide used exclusively as a hotel or as a refreshment house, railway refreshment room or restaurant. The Belfast Gazette of the 4th July, 1924, was put in evidence by the complainant. The defendant proved that his licence had been renewed at the annual licensing sessions held at Ballyclare on the 18th day of September, 1924, the police not objecting. He had received no warning from the police that in their opinion he could not carry on the sale of intoxicating liquor after the 1st day of October, 1924. He also stated that for reasons which he gave it would be impossible for him to alter his premises structurally, and if and when renewal of his licence was refused he would apply for compensation.

3. The complainant contended that the sale of groceries on premises not structurally separated from the part of the premises in which the sale of intoxicating liquor was carried on was a breach of section 6 of the Intoxicating Liquor (Northern Ireland) Act, 1923, 13 & 14 Geo. 5, c. 12.

4. The defendant contended that he was entitled to carry on his business until the annual licensing sessions held next after the 1st day of October, 1924, at which said Sessions it would be competent for the police to object to the renewal of his licence. He relied inter alia

upon sections 3 (1), 6 (2), 6 (4) of the said Intoxicating Liquor (Northern Ireland) Act, 1923, and contended that no offence had been committed.

5. We held that an offence had been committed, and fined the defendant the nominal sum of ten shillings.

6. And the opinion of the Court is sought as to whether we were right in law in holding that an offence had been committed.

E. S. Murphy K.C. and *Chambers* for the defendant and appellant :—

The Act is ambiguous since sections 3 (1), and section 6 (2) is inconsistent with section 6 (1). It is legal to carry on a mixed business until the 1st day of October, 1925, since the licence was renewed before the 1st day of October, 1924, when the Justices had no jurisdiction to refuse the licensing certificate except on the grounds set out in section 11 of the Licensing Act (Ireland), 1854, 17 & 18 Vict., c. 89. Section 6, sub-section 1 of the 1923 Act merely adds to the grounds of objection. It would be open to the Justices in 1925 to say the licence had lapsed if there has been no trading in the previous twelve months. See *The Queen (Lambe)* v. *The Justices of Armagh* (1). It is open to the Justices at the Licensing Sessions for 1925 to refuse to renew the licence on the grounds that no structural alterations have been carried out. The applicant can then claim compensation.

Davison for the complainant and respondent :—

The appellant cannot rely upon other sections of the Act, to make a clear section ambiguous. The Act was passed on the 15th day of June, 1923, and the mixed licensee was given until the 1st day of October, 1924, to make his structural alterations. He could renew his licence at the Licensing Session for 1924 if he liked, but mixed business, notwithstanding the licence, became illegal on and after 1st October, 1924.

SIR DENIS HENRY BART C.J. (delivering the judgment of the Court) said :—This was a summons heard before two Resident Magistrates sitting at the Petty Sessions held at Carrickfergus on the 18th day of November, 1924. The present appellant, William Andrew Boyd, was the

(1) [1897] 2 I.R. 57 at p. 68.

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owner of a mixed business in Straid, County Antrim, and was charged with having sold on the 23rd day of October, 1924, a quantity of groceries in his licensed premises contrary to the provisions of section 6, sub-section 1, of the Intoxicating Liquor (Northern Ireland) Act, 1923. The appellant was convicted and fined ten shillings.

At the request of the appellant, the Resident Magistrates stated a case for the consideration by us of the question whether they were right in law in holding that an offence had been committed.

It is contended by counsel for the appellant that he is entitled to carry on the mixed business until the Licensing Sessions to be held in September, 1925, by virtue of the fact that he obtained a renewal of his licence at the Licensing Sessions held at Ballyclare on the 18th day of September, 1924. It seems to us that this contention is directly opposed to section 6, sub-section 1, of the Act. If the Legislature by appropriate words forbids a mixed business to be carried on, that is an end of the matter. What are the words of the section? "Where any business, other than the sale of intoxicating liquor for consumption on the premises, is carried on in any premises licensed for such sale as aforesaid (not being premises structurally adapted for use and bona-fide used exclusively as a hotel as hereinbefore in this Act defined, or as a refreshment house, railway refreshment room or restaurant), the part of the premises in which the sale of intoxicating liquor is carried on shall be structurally separated from, and have no internal communication, with, the remainder of the building," but the section does not stop there: it continues, "And nothing shall be sold or offered for sale in such part of the premises as aforesaid except intoxicating liquor, tobacco, table waters, and such food as may be supplied for consumption on the premises." In addition to provisions regarding structural separation there is an absolute prohibition as to the sale of groceries on the same premises. This section 6 by sub-section 4 came into force on the 1st day of October, 1924, so that it is now in operation, and was in operation on the 23rd day of October, 1924, the day on which the offence in question is alleged to have been committed. If so, how was it lawful to carry on a mixed

business in the same premises on that date? The section disposes of the entire case.

It is true that the licence was renewed on the 25th day of September, 1924. In consequence from that date until the 1st day of October the defendant could trade as before; after the 1st day of October the section forbad him to do so.

Section 3, sub-section 1, has been relied on by the appellant. What are its provisions? "Compensation shall be payable, in accordance with the provisions hereinafter in this section contained and out of the fund in this section mentioned, in any case where, by reason of the foregoing provisions of this Act with respect to the abolition of certain off-licences, a licence for the sale by retail of intoxicating liquor for consumption off the premises is not renewed at the annual licensing sessions held next after the passing of this Act, in any case where, by reason of inability to comply with the requirements of this Act with respect to the structural separation of the part of any premises in which the sale of intoxicating liquor is carried on from the part of those premises in which any other business is carried on, a licence for the sale by retail of intoxicating liquor for consumption on the premises is not renewed at the annual licensing session held next after the date when such requirements come into operation." Whose inability? The applicant's, of course. If the applicant refuses to get his licence renewed, he can get compensation. But we give no opinion on that point now: it is not before us. The appellant has committeed an offence under section 6, subsection 1, of the Intoxicating Liquor (Northern Ireland) Act, 1923. The question submitted to us will be answered accordingly in the affirmative. We will give no costs.

J. McC.

Solicitors for the defendant and appellant: *O'Rorke, McDonald & Tweed.*

Solicitor for the complainant and respondent: *H. H. Mussen*, Assistant Chief Crown Solicitor, N.I.

Ch. Div. 1925 May 11

IN THE MATTER OF THE ESTATE OF CATHERINE THOBURN, DECEASED.

Orr v Alexander & Megaw

ORR v. ALEXANDER AND MEGAW (1)
(1925. No. 95.)

Wilson, J.

Conversion—Direction for sale in Will—Continuance in possession of realty by person of unsound mind—No Reconversion.

D.T. died on 21st October, 1853. By his will he devised all his freehold property on the trusts following:—"I allow my wife R.T. to have the sole use and occupation of said farm for the support of herself and children during her natural life . . . . At my wife's death I allow my said farm to be sold and the proceeds divided equally between my children or the survivors or survivor of them." The farm was not sold. C.T. was the sole surviving child, and she continued possession of the farm from the death of her mother, R.T., in 1874, until her own death in September, 1924. From 1874 until her death C.T. had been of unsound mind.

Held by Wilson J. that the word "allow" in the will of D.T. was equivalent to "direct," and was an imperative direction to the trustees to convert the property; and that continuous possession by C.T. could not result in reconversion because of her incapacity.

Summons for the determination of the following questions:—

(1) Whether the direction contained in the Will of David Thoburn, deceased, for the sale of his freehold property operated to convert the said freehold property into personalty.

(2) Whether in the events which have happened the said property became reconverted into real estate.

By his will dated 17th October, 1847, David Thoburn devised his freehold property to trustees upon the trusts following:—"I allow my wife, Rebecca Thoburn to have the sole use and occupation of said farm for the support of herself and children during her natural life . . . . At my wife's death I allow my said farm to be sold and the proceeds divided equally between my children or the survivors or survivor of them and if the child not yet born should be a son and my trustees think it advisable I allow my said son to get my farm and to pay each of my daughters one hundred pounds sterling each." David Thoburn died on 21st October, 1853. The farm was not

(1) Before Wilson, J.

sold. His widow, Rebecca Thoburn died on or about 12th September, 1874. From that date Catherine Thoburn, who was the sole surviving child, remained in continuous possession of the farm until her death on 15th September, 1924, but was during the entire time of unsound mind and incapable of managing her affairs.

The plaintiff was the administratrix of Catherine Thoburn's estate; the defendant Margaret Alexander was one of her next-of-kin; and the defendant Megaw was her heir-at-law.

Warnock for the plaintiff stated the facts.

Black for the defendant Margaret Alexander :—

Under the will of David Thoburn all the children are entitled to is a share of the proceeds of the sale of the farm, so clearly the will contains what amount to an imperative direction to the trustees to sell, and the property is thereby converted into personality. In wills made in the North of Ireland the word " allow " is used and is construed to mean " direct " : see *Elliott* v. *Montgomery* (1). A somewhat similar case is *Grierson* v. *Kersopp* (2). It is true the person legally entitled can elect to reconvert and an intention to reconvert is shown by entering on the property and remaining in possession of it in its original form. But to make a valid election, the person must be sui juris : a lunatic has no power to make an election : see *Ashby* v. *Palmer* (3). The deceased was quite unfit to make an election.

MacDermott for the defendant Megaw :—

There was no conversion : to convert there must be an imperative direction to that effect. *Hyett* v. *Mekin* (4), *Lucas* v. *Brandreth* (5). *Elliott* v. *Montgomery* (1) was decided on its own particular facts. Here the word " allow " clearly gives a discretion. Even if there were a conversion, there has been a reconversion. Continuous possession of the property in its original form is clear evidence of an intention to reconvert. The evidence that Catherine Thoburn was of unsound mind is very vague.

(1) Ir. Rep. 5 Eq. 214.
(2) 2 Keene 653.
(3) 1 Mer. 296.
(4) 25 Ch. Div. 735.
(5) 28 Beav 273.

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ORR v ALEXANDER & MEGAW

WILSON J. :—I am of the opinion that the words in the will of David Thoburn, deceased, " I allow my said farm to be sold," are equivalent to an imperative direction to his trustees to convert his freehold property into personalty at his wife's death, which occurred in 1874. The proceeds of the sale of the farm were to be divided between the testator's children: consequently the farm devolved on Catherine Thoburn, the deceased, his sole surviving child, as personalty.

The further question arises whether Catherine Thoburn, by remaining on the farm for fifty years without effecting a sale, elected to reconvert into realty what came to her as personalty. From Mr. Craig Houston's affidavit it is practically certain that on or about 1874, by reason of her unsoundness of mind she could not make any election. She simply remained on in possession after her mother's death. The medical certificates state that in 1904 she was quite incapable of managing her affairs. No application was made to the Court to direct that an election should be made on her behalf. Accordingly I hold that she was never capable of making an election, and in fact did not elect, and accordingly that the property devolves as personalty on her next-of-kin.

To the first question I answer " Yes," and to the second question, " No," and I allow all parties their costs out of the estate.

Solicitors for the plaintiff: *M'Lean & Son.*

A. A. C.

Solicitors for the defendant Alexander: *White, Macmillan & Wheeler.*

Solicitors for the defendant Megaw: *C. & J. Black.*

[IN THE COURT OF APPEAL.]

K. B. D.
1924

Nov. 28
Dec. 10
Appeal
1925
April 22
April 27.

KING AND BOYD
v.
PORTER (1).

(1924. No. 2458.)

Cheque not presented within a reasonable time—No actual damage through delay—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61) Sect. 45, Sub-s. 2, Sect. 73, Sect. 74.

A cheque for £150 dated 3rd May, 1921, drawn upon the bank by the defendant payable to T. B., was indorsed by T. B. to the plaintiff. The cheque was drawn by the defendant, an auctioneer, in payment of a sum realised by the sale of cattle sold for T. B. The cheque was brought by T. B. to the office of the plaintiffs and handed to a clerk, who put it in an envelope in the firm's safe. The cheque remained in the safe until February, 1924, when it was discovered. The cheque was indorsed by T. B. on 1st March, 1924, presented for payment on 11th March, 1924, payment refused on 14th March, 1924, and notice of dishonour was given on 15th March, 1924. On the presentment and dishonour of the cheque the plaintiffs sued the drawer for the amount.

Held by the Court of Appeal (Moore and Andrews, L.JJ.), affirming the judgment of Sir Denis Henry Bart., C.J., that in the absence of any damage caused by the delay in presenting the cheque the drawer was not discharged by the cheque not having been presented within a reasonable time; so far as the drawer is concerned cheques are by Section 74 of the Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), taken out of the operation of Sect. 45 of that Act.

APPEAL from the judgment of Sir Denis Henry Bart. C.J. sitting without a jury, in an action claiming £150, being the amount of the defendant's cheque to Thomas Braniff, dated 3rd May, 1921, drawn upon the Belfast Banking Company, Limited, Downpatrick, and indorsed by Thomas Braniff to the plaintiffs. The cheque was drawn by the defendant, an auctioneer, in payment of a sum realized by the sale of certain cattle for Thomas Braniff. It was brought at once by Braniff to the office of Messrs. King and Boyd, Solicitors, in Downpatrick, and handed by him to a clerk, who put it in an envelope in the firm's safe. It was not indorsed by Braniff, but he owed Messrs. King and Boyd at that date £223 19s 1d, and it was in connection with this liability that the cheque was handed in.

(1) In the Court of Appeal before Moore and Andrews, L.JJ.

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The clerk left the employment of Messrs. King and Boyd a short time after. He never mentioned that he had got the cheque, and it remained in Messrs. King and Boyd's safe until the end of February, 1924, when Mr. George Hughes, the managing assistant of the plaintiffs' firm found the cheque. Mr. Hughes took the cheque to the defendant and asked him to change the date. On 1st March, 1924, the cheque was indorsed by Braniff. On 8th March, 1924, Hughes again saw the defendant, who declined to alter the date of the cheque as Braniff owed him money on bills. On 11th March, 1924, the plaintiffs wrote to the Manager of the Belfast Banking Co., Ltd., at Downpatrick, formally demanding payment of the cheque, and on 14th March, 1924, a reply was received returning the cheque and stating that the defendant would not authorize payment. Notice of dishonour was given by the plaintiffs on 15th March, 1924.

Macafee K.C. and *S. C. Porter* for the plaintiffs.

W. M. Whitaker K.C. and *Hume* for the defendant.

Dec. 10

SIR DENIS HENRY BART. C.J.: This is an action by Messrs. King & Boyd, solicitors, against Mr. Moses J. Porter to recover a sum of £150 0s 0d principal, and £22 17s 5d interest on foot of a cheque for £150, dated 3rd May, 1921, drawn by the defendant upon the Belfast Banking Company, Downpatrick Branch, payable to Thomas Braniff or order, and by him indorsed to the plaintiff, and which it is alleged was duly presented for payment and was dishonoured, of which the defendant had due notice.

The facts of the case are peculiar. The cheque was drawn by Mr. Porter, who is an auctioneer, in payment of a sum realised by the sale of certain cattle for Mr. Thomas Braniff. It was brought at once by Mr. Braniff to the office of Messrs. King & Boyd in Downpatrick, and handed by him to a clerk called Vincent Quinn, who put it in an envelope and put it in the firm's safe. It was not indorsed by Braniff, but he owed the firm at that date £223 19s 1d, and it was in connection with this liability that the cheque was handed in.

Quinn left the employment of Messrs. King & Boyd a short time after. He never mentioned that he had got the cheque, and it lay there until the end of February, 1924, when Mr. George Hughes, the managing assistant of plaintiff's firm, when searching for some documents in the safe found the cheque.

Mr. George Hughes said: "I spoke to Mr. Porter and told him we would feel obliged if he could change the date. Mr. Porter said certainly, but possibly it was paid. I said it would not be paid as the cheque was there. I asked him to look it up and get the block. The cheque was indorsed by Braniff on 1st March, 1924. I saw him later, 8th March, and he declined to alter the date as Braniff owed money on bills. I told Mr. Boyd."

On 11th March a letter was written to the Bank and a reply sent on same date, and on 14th March Mr. Martin, the bank manager, wrote returning the cheque. Mr. Boyd, solicitor, was examined and swore he called with Porter on 15th March after he got back cheque and gave notice of dishonour. There was some controversy, especially as to the statement of Mr. Hughes that no mention was made about bills to him; but I accept the evidence of Messrs. Hughes & Boyd. The cheque was drawn 3rd May, 1921, indorsed 1st March, 1924, presented for payment 11th March, 1924, payment refused on 14th March, 1924, notice of dishonour given 15th March, 1924. The question now is what is the legal result?

It was contended by Mr. Whitaker and Mr. Hume for the drawer that as the cheque was not presented within a reasonable time, they were discharged. They also alleged that they did not receive due or any notice of dishonour. I came to the conclusion that due notice of dishonour was given on the 15th. I also came to the conclusion that the cheque was not presented in a reasonable time. What is the effect of this?

Section 45 of the Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), sub-s. (2), provides that "where the bill is payable on demand, then subject to the provisions of this Act, presentation must be made within a reasonable time after its issue in order to render the drawer liable,

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and within a reasonable time after its indorsement, in order to render the indorser liable.

"In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case."

Section 73 (part III. of the Bills of Exchange Act, 1882) (Cheques on a Banker), applies to cheques and provides that "except as otherwise provided in this part the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

It will be observed there are two saving clauses, one in section 45, "subject to the provisions of this Act"; the other in section 73, Part III. headed "Cheques on a Banker," "except as otherwise provided in this part," and when one looks at the next section, 74, it seems clear that non-presentment within a reasonable time does not release the drawer in the case of a cheque. Here there was no actual damage through the delay, as Mr. Porter thought the cheque was paid, and this is not disputed.

Before the Bills of Exchange Act, 1882, it was settled that the mere omission to present a cheque for payment did not discharge the drawer until six years had elapsed, *Laws* v. *Rand* (1), and I can find no provision altering this rule, and section 74 to my mind clearly establishes the contrary in the case of a cheque.

In Chalmer's Bills of Exchange (eight edition), p. 287, occurs the following passage referring to section 74 of the Bills of Exchange Act, 1882. "This section (that is section 74) alters the previous law. It was introduced in the Lords by Lord Bramwell to mitigate the rigour of the common law rule. At common law the mere omission to present a cheque for payment did not discharge the drawer, until at any rate six years had elapsed, and in this respect the common law appears to be unaltered. But if a cheque was not presented within a reasonable time, as defined by the cases, and the drawer suffered actual damage by the delay, e.g., by the failure of the bank, the drawer was absolutely discharged, even though ultimately the bank might pay (say) fifteen shillings in the pound."

(1) 3 C.B.N.S. 442.

Sir John Paget, in his work on the Law of Banking (1904 edition), dealing with the same question, says:— "It is the custom of bankers not to pay cheques which are presented after a certain period has elapsed since their ostensible date of issue. With some banks the period is six months, with others twelve."

The justification for this course is not very obvious. The difference above alluded to between the practice of various banks make it difficult to set up a custom of bankers. Such a custom must be universal and uniform among at least the bankers of a particular locality; there cannot, for instance, be one custom of bankers in the city and another in the West End. Nor does the custom of a particular bank bind even a customer until it develops into a course of business. The practice may owe its origin to the impression that the drawer of a cheque is discharged from liability if it is not presented within a reasonable time after issue. The Bills of Exchange Act is certainly not very explicit on the point. Sect. 45 provides that, subject to the provisions of this Act, a bill must be duly presented for payment, otherwise the drawer and indorsers shall be discharged. Sub-sect. 2 enacts: "Where a Bill is payable on demand, then subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable."

It is only by inference from sect. 74 and by virtue of the words "subject to the provisions of this Act" in sect. 45, that cheques are, in ordinary cases, exempted from the operation of the latter section. Section 74 in effect provides that where a cheque is not presented within a reasonable time after issue, and the drawer had at the time it ought to have been presented, a right as between him and his banker to have the cheque paid, and is injured by the delay through his bankers having failed in the interval, he is discharged to the extent of such damage. This implies that in the absence of such damage, the drawer is not discharged by the cheque not being presented within a reasonable time; and as before stated, takes cheques, so far as the drawer is concerned, out of the operation of section 45. Save under the conditions defined in section 74, the drawer therefore remains liable

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on the cheque till the Statute of Limitations has run, namely for the period of six years from its issue, *Laws* v. *Rand* (1), where this was laid down as the law before the Act.

The defendant claimed in his solicitor's letter a right to set off other bills against this cheque, but this was not pleaded and does not seem to have been persisited in, probably because his counsel, Mr. Hume, had read *In re Overend Gurney & Co. Ex parte Swan* (2) and *Oulds* v. *Harrison* (3) which establish that this cannot be done, even in the case of an overdue bill.

For the reasons given I have come to the conclusion that the plaintiffs are entitled to recover, and I accordingly give judgment for the plaintiffs for £150.

The defendant appealed to the Court of Appeal (4)

W. M. Whitaker K.C. and *Hume* for the appellant :—

Our principal defence is that the cheque was not presented within a reasonable time. There is no decision on the point since the passing of the Bills of Exchange Act, 1882. All the cases dealing with the question prior to the Act are referred to in *Laws* v. *Rand* (1).

The Bills of Exchange Act, 1882, is described in its preamble as, " An Act to codify the law relating to bills of exchange, cheques and promissory notes." As to the effect of codification we rely on *Bank of England* v. *Vagliano Brothers* (5), and especially on the judgment of Lord Halsbury C. at p. 120, where he said : " It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed." The judgment of Lord Herschell at p. 144 is to the same effect.

It is only the provisions of a bill of exchange payable on demand that apply to a cheque (sect. 73) The onus

(1) 3 C.B.N.S. 442. (2) L.R. 6 Eq. 344. (3) 10 Ex. 572.
(4) In the Court of Appeal before Moore and Andrews, L.JJ.
(5) 1891 A.C. 107.

is upon the respondent to show that it is otherwise provided. We submit that the effect of the Bills of Exchange Act, 1882, is to abolish the old common law rule and to establish that the cheque not having been presented within a reasonable time, the defendant is discharged. There is no section in part II. of the Act which corresponds to section 74 . There is no provision in part II. dealing with actual loss. We submit that section 74 is a special provision put in to deal with the case where there has been actual loss occasioned through the delay, and that it is not intended to be in substitution for anything else in the Act, it is an additional right. This section deals with a set of circumstances which do not arise in the present case. We believe that there is no case of a cheque that remained unpresented so long as that in the present case. If section 74 was not there, the governing section would be section 45.

Byles on Bills (18th edition), referring to the cases decided before the passing of the Bills of Exchange Act, 1882, says " these cases are now to be considered subject to the express statutory provision of the custom of bankers, introduced since their decision, and also to the statutory recognition of crossed cheques."

We submit that section 45 applies to cases where section 74, sub-section 1, does not apply, and that on the face of section 73 the old common law rule does not apply.

The law has been altered by the Bills of Exchange Act, 1882. To render the drawer of a cheque liable it must now be presented within a reasonable time, whether loss has been occasioned by the delay or not. By section 73 a cheque is defined as a bill of exchange drawn on a banker payable on demand, and by section 45, sub-s. 2, where a bill is payable on demand, presentment must be made within a reasonable time after its issue to render the drawer liable.

They also referred to *Robinson* v. *Hawksford* (1) and *M'Lean* v. *The Clydesdale Banking Company* (2).

Macafee K.C. and *S. C. Porter* for the respondent :—
Is it to be suggested that where there has been no loss

(1) 9 Q.B. 52. (2) 9 A.C. 95.

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the drawer of a cheque is completely relieved although he is only partly relieved where there has been a loss.

We submit that section 74 takes the drawer of a cheque out of section 45. Section 74 is merely a codification or embodiment of the law as already existing. The law as laid down in *Laws* v. *Rand* (1) and *Robinson* v. *Hawksford* (2) is still the law except where the drawer has suffered actual damage through the delay. We submit that it is implied that where no loss has occurred the drawer is not released.

The law is very clearly expressed by Paget in his book on The Law of Banking (3rd edition), where he says, at p. 217, "the drawer's liability holds good for six years, save in the contingency of the cheque not having been presented within reasonable time, the bank having failed within such reasonable time, and the drawer having lost money by reason of such failure and non-presentation, in which case he is discharged to the extent of his loss and no further. . . . A man who takes a cheque either direct from the drawer or by subsequent negotiation is perfectly entitled to hold it for any any time short of six years from issue, and then present it, and, if not paid, sue the drawer unless the bank has failed meantime; his only loss of remedy is that against indorsees if he has not presented within reasonable time of such indorsement."

MOORE L.J.: The facts in this case are simple. The Lord Chief Justice has found that the cheque in issue was not presented in a reasonable time, but that the drawer had not suffered any loss by reason of the delay.

The common law before the Bills of Exchange Act, 1882, gave the payee of a cheque six years for its presentation within a reasonable time provided the drawer had not in the interim suffered loss by the delay. If the drawer had suffered any loss at all the whole cheque was taken as discharged against him by reason of the delay in presentation, and apparently this delay need not necessarily be a delay of six years. *Laws* v. *Rand* (1).

The question in the present case is how far this transaction is governed by the common law rule, or to what extent the provisions of the Bills of Exchange Act, 1882, altering that rule apply.

(1) 3 C.B.N.S. 442. (2) 9 Q.B. 52.

By Part III. of the Act, section 73, a cheque is defined as "a bill of exchange drawn on a banker payable on "demand," and the section continues "Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

The provisions of the Act relating to bills of exchange payable on demand so far as relevant to the present action are to be found in Part II. of the Act, section 45: "Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged." Then follows a requirement that the presentation must take place within a reasonable time, and a further provision for determining how a reasonable time is to be ascertained.

But section 73 limits the application of the Act relating to bills of exchange payable on demand by the words "except as otherwise provided in this part."

Turning to the contents of "this part" we find in section 74 that where there has been undue delay and a loss to the drawer the drawer is inferentially only discharged to the extent of such loss, and would remain liable for the balance.

It will be seen that section 74 altered the common law by only discharging the drawer not from any loss but to the extent only of his loss. If section 45 of the Act applied to cheques as has been contended before us, section 74 also altered that, because whether there was loss or not section 45 in such case discharged the drawer in any case of unduly delayed presentation. If section 74 were in an independent statute it would be quite inconsistent with section 45. But it might be possible to treat it as an amendment by way of exception to section 45 occurring in the same statute, though it is not drafted in such a form. If it is not an amendment to section 45 it is inconsistent with it. But in either event section 74 only applies to case where there has been both delay and loss in consequence.

The result would, therefore, be reached that if section 45 applied to cheques, the drawer would be wholly discharged by delay where he had suffered no loss, but would

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still be liable for a balance however considerable where such delay had caused a loss.

I think this would be both absurd and unjust. I refer to the passage in the judgment of Coleridge C.J. in *Reg* v. *Clarence* (1) " If the apparent logical construction (of a statute) leads to results which it is impossible to believe those who framed or those who passed the statute contemplated, and from which one's own judgment recoils, there is in my opinion good reason for believing that the construction which leads to such results cannot be the true construction."

I cannot think that the Legislature intended such an anomalous result, and in order to arrive at a conclusion more consistent with rules of law and good sense I am driven to the other construction, namely, that section 45 was not intended to cover the case of cheques at all : that section 74 only legislated for late cheques where there was a loss leaving late cheques where there was no loss unprovided for, and that therefore the cheque in the present case falls under the old law, and the drawer is not discharged by delay under six years. The judgment is right, and must be affirmed. We dismiss the appeal with costs.

ANDREWS L.J. : The material facts of this case are fully stated by the Lord Chief Justice in his judgment, and need not be repeated. The net question argued before us may be shortly stated thus : Is the defendant, the drawer of the cheque, relieved from liability upon it by reason of the fact that it was not presented for payment until almost three years after it had been drawn, which the Lord Chief Justice held as a fact—and his finding on this point is not challenged—was not within a reasonable time? It is admitted that the defendant suffered no damage by reason of the delay in the cheque's presentment.

There is no dispute as to the rules of the common law which existed prior to the Bill of Exchange Act, 1882. The only limitation upon the right of the holder of a cheque to recover the amount thereof from the drawer, where no damage resulted to the latter from the delay in presentment for payment, was the period of six years, which barred the claim under the Statute of Limitations.

(1) 22 Q.B.D. 85.

As Patteson J. said in *Robinson* v. *Hawksford* (1), "As between the drawer of a cheque and the holder, if presentment is deferred to such a time that inconvenience has been sustained, the time may then be deemd unreasonable: but if none has resulted, I see nothing unreasonable in a presentment I should even say at any time within six years." This case followed the decision of the Court in *Alexander* v. *Burchfield* (2), where Tindal C.J. in giving judgment said:—"In the case of a cheque, the holder does not lose his remedy against the drawer, by reason of non-presentment within any prescribed time after taking it, unless the insolvency of the party on whom it is drawn has taken place in the interval; that is, unless there is an actual loss to the drawer." These decisions were followed by Cresswell J. in *Laws* v. *Rand* (3).

On the other hand, the law was equally clearly established that where the drawer suffered any injury through delay in presentment for an unreasonable time he was entirely discharged from liability, for, although the cheque was originally neither given nor taken in satisfaction, yet it was kept by the holder and dealt with as he had no right to keep and deal with it except on the footing that it was his own, without recourse to the drawer. It, therefore, became his own; he made it payment, and the drawer was discharged *Hopkins* v. *Ware* (4).

Mr. Whitaker, for the defendant, however, contends that the law, as above stated, has been altered by the Act of 1882; and that to render the drawer of a cheque liable it must now be presented within a reasonable time, whether loss has been occasioned by the delay or not. His argument put briefly is simply this: By S. 73 a cheque is made a bill of exchange drawn on a banker payable on demand; and by S. 45 (2) where a bill is payable on demand presentment must be made within a reasonable time after its issue to render the drawer liable. In answer to this argument Mr. Macafee has directed our attention to the "saving words" both in sections 73 and 45 (2). In the former the words are "Except as otherwise provided in this part (i.e., Part III. of the Act "relating to 'cheques on a Banker'), the provisions of

(1) 9 Q.B. 52. (2) 7 M. & G. 1061. (3) 3.C.B.N.S. 442
(4) L.R. 4 Ex. 268.

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"this Act applicable to a bill of exchange payable on demand apply to a cheque." The provisions of section 45 (2) are in like manner expressly stated to be "subject to the provisions of this Act."

The question for our determination is, therefore, whether it is provided in the Act either expressly or by necessary implication that the provisions of S. 45 (2) relating to a bill of exchange payable on demand do not apply to a cheque, where, as in the present case, the delay in presentment for what in the case of a bill of exchange would be an unreasonable time has not resulted in any loss to the drawer. In my opinion, though there is no such express provision in the Act, this is the necessary inference to be drawn from S. 74 (1) which reads as follows:—

[His Lordship read the section.]

This section was introduced by the legislature in case of the holder of the cheque, as pointed out in *Chalmers on Bills of Exchange* (8th edition, p. 287), to mitigate the rigour of the common law rule which, as already stated, discharged the drawer absolutely from all liability on the cheque when he was in any measure damaged by the delay in presentation of the cheque. Under this section he is only discharged to the extent of his damage.

Here in my opinion is a clear intimation by the Legislature that S. 45 (2) is not intended to apply to a case such as the present; for it would be manifestly absurd to say that the drawer should be absolutely relieved from all liability on the cheque where no damage has resulted to him from the delay, whereas he should only partially be discharged in cases in which damage has accrued.

The case has been presented to us as devoid of authority since the Bill of Exchange Act, 1882. It is true that there may be no conclusive authority, but I deem it not unimportant to refer to the judgment in the year 1887 of Stirling J. in *In re Bethell, Bethell* v. *Bethell* (1). As the cheque in that case had been drawn in the year 1878, Stirling J. recognised that the Act of 1882 did not govern that case; but, referring with approval to the judgment of Patteson J. in *Robinson* v. *Hawksworth* (2), he adopts the

(1) 34 Ch D. 561 at p.p. 566-7. (2) 9 Q.B 52.

view of Lord Blackburn in *M'Lean* v. *Clydesdale Banking* (1), that the Act may be accepted as declaratory of the prior law. Reading this in general terms, and as undoubtedly subject to the amendment in the law effected in favour of the holder of a cheque by S. 74, s.-s. (1), where damage has resulted from the delay in its presentment, I think the opinion of the learned judge may be accepted as at least a dictum strongly confirming the view which I have expressed as to the application of the common law rule to the facts of the present case.

I only wish to add that this difference in the law between cheques and bills of exchange payable on demand is based on sound reason and principle. The drawer of a bill, having presumably given consideration for the bill, has the right to expect that the bill will be paid by the drawee. As a quasisurety he is, therefore, entitled to know his liabilities within a reasonable time. On the other hand, the drawer of a cheque knows that his banker will only pay if he has money of the drawer to pay with. He has no right over, as the drawer of a bill would have, against the drawee or any other person. It is his duty, therefore, to keep money at his bankers to meet the cheque whenever presented; and he has no legitimate ground for complaint, and, accordingly, no reasonable claim for relief, unless by reason of the delay in presentment of the cheque he has, as in the case of the banker's failure, suffered loss of the money he was keeping at the banker's to meet it (see judgment of Byles J. in *Keene* v. *Beard* (2).

For these reasons I agree that this appeal should be dismissed with costs.

(1) 9 A.C. 95, 106. (2) 8 C.B.N S. 372, at p. 381.

Solicitors for the appellant: *H. Wallace and Co.*

Solicitors for the respondents: *S. Ross and Co.*

J. McC.

McKEE v. MALCOLMSON and OTHERS (1)

K.P.D. Appeal

April 27, 28, May 11

M'KEE v MALCOLMSON

[In the Court of Appeal].

(1923 No. 3726.)

Highway—Nuisance—Motor Cycle trial races on public highway—Negligence—New trial limited to assetment of damages—Fatal injury to spectator—" Volenti non fit injuria "—9 and 10 Vic., c. 93, R.S.C. 1905, Or. 40.

Motor cycle trial races were held on the public highway on 28th April, 1923. H. McK. was standing at the verge of the road, at about the middle of the course, watching the races, when a motor bicycle ridden by the defendant M. hit a bump in the road, wobbled, and struck H. McK. and killed him. No sanction had been given by the proper authority to hold these races on the public highway.

In an action under the Fatal Accident Act, 9 & 10 Vict., c. 93, brought by the mother of H. McK. against M. the jury found that the holding of the motor speed trials rendered the highway on which they were held dangerous for persons lawfully using it.

Held by the Court of Appeal (Moore and Andrews L.J.J.) (a) that this finding amounted to a verdict that the competition in wihch the defendants took their respective parts was a nuisance in law, (b) that the finding of the jury that the deceased attended the speed trials as a spectator could not be presumed to mean that he knew that the organisers of the meeting were doing an act which was unlawful, proper sanction not having been obtained, and (c) that the finding by the jury that the deceased understood the risk he was running could not be sustained, and that on the findings of the jury the plaintiff was entitled to recover.

MOTION by the defendants that judgment be entered for them, and by the plaintiff asking for a order for a new trial of the action.

On Saturday, 28th April, John and Harry McKee, two sons of the plaintiff, left their home in Belfast, and proceeded to ride on push bicycles to Bangor, going by the inland road. After they had ridden for some distance and were about a mile from Clandeboye, the tyre of one of the bicycles became punctured. They endeavoured unsuccessfully to repair the pucture. After they had proceeded farther, they saw a crowd on another road to

(1) In the Court of Appeal before Moore and Andrews, L JJ.

the right towards Newtownards. They went to the crowd to look for some one with repair material, and found that the North Down Motor Speed Trials were being held. Another brother, James McKee, arrived on his bicycle at the course where the crowd was collected about five minutes after his brothers. He had with him mending material and solution for repairing cycle punctures. When James McKee came up, the three of them were on the left side of the road, looking towards Newtownards. They began to mend the puncture, and while doing so the motor speed trials started, the competitors going towards Newtownards. After the puncture had been mended Harry and John McKee went to the right-hand side of the road, but James remained on the left-hand side. Harry McKee was two or three yards from his brother John. The motor cycle of the defendant Malcolmson, who was competing in the speed trials, when about forty yards away from Harry McKee, hit a pot-hole in the road, developed a speed wobble, zig-zagged, and dashed into the ditch, the bicycle striking and killing Harry McKee.

The competition was held on the public highway without the sanction of the proper authority; and was organized and controlled by the defendants, other than Malcomson, who were the committee of the North Down Motor Cycling Club.

The jury found that the defendant Malcolmson was not guilty of negligence in the driving, management, or control of his motor bicycle; that the holding of motor bicycle speed trials rendered the highway dangerous for persons lawfully using it; that the highway was unfit for the holding of motor speed trials; that the defendants, other than Malcolmson, were guilty of negligence (a) in inducing or permitting Malcolmson to drive a motor bicycle at a dangerous or excessive speed over the highway, (b) in inducing or permitting Malcolmson to race with another cyclist on the highway when persons including Harry McKee, were standing on the highway, (c) in permitting or inducing motor bicycles to be driven at racing speed along the highway in its then condition; that Harry McKee at the time he was struck was attending the speed trials as a spectator, and was lawfully on the highway; that Harry McKee understood and voluntarily in

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curred the risk he was running; that Harry M'Kee was not guilty of negligence.

The action was tried before Sir Denis Henry C.J. who, on the findings of the jury, abstained from entering up judgment, and left the parties to move for judgment.

McGonigal K.C., *Beatty K.C.* and *McKean* for the defendant James V. C. Malcolmson.

We submit that we are entitled to judgment on the findings of the jury. The question of negligence or no negligence depends upon the position of the particular individual and the circumstances of the particular case. Nuisance is not pleaded against the defendant Malcolmson, and no question as to nuisance was left to the jury. The whole case was fought as one of negligence. Although there was no authority to run the race, it was allowed by the police. Negligence means a breach of duty with regard to particular individuals. *Thomas* v. *Quartermaine* (1). If an individual fully cognisant of the danger, runs the risk of that danger, qua him there is no negligence, whether the race is run under lawful authority or not. We might have no defence to an action against an ordinary wayfarer, but an invitee need only be warned of concealed dangers.

[ANDREWS L.J.: "The duty is surely to take reasonable care in the case of an invitee."]

McGonigal K.C. There must be a breach of duty towards the plaintiff himself. Applying the principle of *Thomas* v. *Quartermaine* (1) to the present case, Harry M'Kee came on the scene perfectly voluntarily, as a spectator of these races. He took all the risks, and the jury have so found. He came to see Malcolmson competing at a dangerous and excessive speed, and Malcolmson was guilty of no breach of duty towards him. In *Vaughan* v. *The Taff Vale Railway Company* (2) Willes J. defines negligence as the absence of care according to the circumstances, and in *Wakelin* v. *London and South Western Railway Co.* (3) Brett M.R. defies negligence as "the doing of something which a person of ordinary care and skill under the circumstances would not do, or omitting to do something which such a person under the circumstances would do."

(1) 18 Q.B D. 685.

(2) 5.H. & N. 679 at p. 688. (3) [1896] 1 Q.B. 189 at p. 191.

The jury have found that the defendant Malcolmson was not guilty of negligence in the driving, management, or control of his motor bicycle. They were both taking part in the race, the one as competitor, and the other as spectator. Both competitor and spectator were willing to take the risks of the road.

[ANDREWS L.J. : " Was this young man not entitled to assume that the race was being run under lawful authority?"]

McGonigal K.C. : No illegality is pleaded against us.

We submit that the law is correctly stated in Pollock on Torts (Ninth Edition) pp. 167 & 8, as follows:— " Trials of strength and skill . . . . afford when carried on within lawful bounds, the best illustration of the principle by which the maxim volenti non fit injuria is enlarged beyond its literal meaning. A man cannot complain of harm . . . to the chances of which he has exposed himself with knowledge and of his free will. Thus in the case of two men fencing or playing at single stick, volenti non fit injuria would be assigned by most lawyers as the governing rule, yet the words must be forced. It is not the will of one player that the other should hit him; his object is to be hit as seldom as possible. But he is content that the other shall hit him as much as by fair play he can; and in that sense the striking is not against his will. Therefore the " assault " of the school of arms is no assault in law. Still less is there an actual assault if the fact is an accident, not a necessary incident, of what is being done; as where in the course of a cricket match a player or spectator is struck by the ball . . . It may be said that these examples are trivial. They are so, and for that reason appropriate. They show that the principle is constantly at work, and that we find little about it in our books just because it is unquestioned in common sense as well as in law."

Negligence is a question of fact, *Osborne* v. *London and North Western Railway Co.* (1), and the jury have found it in the defendant Malcolmson's favour.

Nuisance is a question of fact for the jury From the

(1) 21 Q.B.D. 220.

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beginning we made the point that the deceased man was a co tort-feasor with our client. There is no law prohibiting the holding of motor cycle races, and there is no right of action for exceeding the speed limit. The two parties were in pari delicto. The deceased was not bound to assume that the race was being run under lawful authority. There is no such things as abstract negligence. It is obvious that the deceased and his two brothers were present for the purpose of watching these races. For Malcolmson to ride as quickly and well as he could was not negligent. So far as the parties were concerned, the position is just the same as if the contest had taken place in private grounds. The law on the subject of the risks incident to games and pastimes is, we submit, correctly stated in Halsbury's Laws of England, vol. 21, p. 478, par. 800. Harry McKee knew the risk he was running, and undertook it voluntarily. We submit that volenti non fit injuria is an answer on the questions both of negligence and of nuisance. There was, we submit, no evidence whatever of negligence on the part of Malcolmson. If the deceased was present for the purpose of seeing Malcolmson ride at an excessive speed, no duty was owed to him. As to the question of nuisance, we submit that on this occasion the deceased man was not lawfully using the highway for the purpose of watching the speed trials. If there was any nuisance, Harry McKee was himself part and parcel of that nuisance. The burden of the case as against us was negligence, and assuming that we were guilty of negligence, the maxim volenti non fit injuria applies.

We submit that the plaintiff was not entitled to recover, and that there should be judgment for the defendant Malcolmson.

Williamson K.C., *Babington K.C.* and *Hume* for the other defendants, the Committee of the North Down Motor Cycling Club.

The maxim volenti non fit injuria is a shield for us. The applicability of this maxim is not a question of law. It applies just as much to a stranger as to master and servant. *Membery* v. *Great Western Railway Co.* (1) There was no finding of the jury on nuisance. Even if the

(1) 14 A.C. 179.

nolding of this competition constituted a nuisance, volenti non fit injuria applies. We submit that the deceased was a joint tort-feasor. To make the defendants liable, illegality by them must be proved. On the findings of the jury we are entitled to judgment. There are two things which must be kept distinct, illegality and negligence. There is no statutory duty on the defendants. Negligence must be proved; it is not sufficient for the plaintiff merely to say that the defendant Malcolmson was travelling at a rate of more than twenty miles an hour. Volenti non fit injuria does not arise until negligence has been found. We suggest that the fact that the race was run upon a public road makes no difference. We submit that the illegality of excessive speed has been confused with the question of negligence. We contend that the jury found for the defendants on the question of volenti non fit injuria. On the question of negligence we rely on Lord Esher's judgment in *Yarmouth* v. *France* (1), and especially on that portion of it at p. 656, where he says "knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open, but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete." There was no nuisance committed as regards Harry McKee. The riding at an excessive speed is not in itself a nuisance. In any case, if there was a nuisance, Harry McKee was not injured by it. It has been suggested that the doctrine of volenti non fit injuria applies only to actions between master and servant, but *Torrance* v. *Ilford Urban District Council* (2) and *Giles* v. *London County Council* (3) are authorities to the contrary. The deceased knew there was to be a race, that it was for speed, and that in all these things there must be a certain amount of risk. Such an inference might reasonably have been drawn by the jury. There was knowledge coupled with the doing of an act. *Abbott* v. *Freeman* (4). The mere presence of Harry McKee unexplained at the speed trials is evidence of aiding and abetting. *Reg* v. *Cooney* (5). We submit

(1) 19 Q.B.D. 647 (2) 25 T.L.R. 355. (3) 68 J.P. 10.
(4) 35 L.T.R. (N.S.) 783. (5) 8 Q.B.D. 534.

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that this is a good verdict for the defendants on the ground of volenti non fit injuria which applies to a nuisance.

E. S. Murphy K.C., *Pringle K.C.* and *Warnock* for the plaintiff :—

We challenge the assertion that there is no claim in nuisance. The answer of the jury to the second question is a clear finding on nuisance, specifically directed to the special facts of this case. There is a passage at p. 365 of Beven on Negligence (3rd edition) which correctly states the law: "Ordinary people may stop, may talk, may rest, may look about them, may act with great latitude without losing their rights as passengers on a highway; they must, however, not take advantage of their presence on the highway for promoting objects inconsistent with its lawful user." On the question of nuisance we rely on *Harrold* v. *Watney* (1), and especially on the judgments of A. L. Smith L.J. and Vaughan Williams L.J. We also rely on the judgment of A. L. Smith L.J. in *Hickman* v. *Maisey* (2). There is no evidence to support the findings of the jury that Harry McKee understood the risk he was running, and voluntarily incurred it. It cannot be suggested that the deceased man could have anticipated danger. The strength of our argument is directed to the knowledge of the risk. There is no necessary inference that the deceased voluntarily incurred the risk. A public road cannot become in any circumstances without statutory authority a racing track. No case can be found precisely applicable to the facts that exist here. We submit that the doctrine of volenti non fit injuria cannot be applied to the present case. There is no case where this doctrine has been applied to a complete stranger or to a mere spectator. *Membery* v. *Great Western Railway Co.* (3) is a typical instance of a case in which volenti non fit injuria was applied. *Smith* v. *Baker & Sons* (4) seems to be strongly in our favour. If Lord Bramwell in this last case correctly states the law then the doctrine of volenti non fit injuria has no application to the facts of the present case. We strongly rely on *Thomas* v. *Quartermaine* (5), and especially on the judg-

(1) [1898] 2 Q.B. 320 (1) [900] 1 Q.B. 752 at p. 755.
(3) 14 A.C. 179. (4) [1891] A.C. 325 at p. 344
(5) 18 Q.B.D. 685

ment of Bowen L.J. We rely particularly in the passages in his judgment contained on pages 694, 696, 697. We submit that the doctrine of volenti non fit injuria does not apply to a case of nuisance, coupled with express breach of statutory provisions. *Osborne* v. *London and North Western Railway Co.* (1) materially strengthens our argument. There is no evidence to show that the deceased man ever understood that there was any danger whatever, nor that he had any knowledge of the state of the road. The risk must be understood, appreciated, and voluntarily undertaken. The doctrine of volenti non fit injuria is dealt with in Beven on Negligence (third edition), p. 112. We submit that the deceased was not a joint tort-feasor, and that the finding of the jury that he was attending the speed trials as a spectator is not supported by the evidence, and is entirely inconsistent with their finding that he was lawfully on the highway. The fact that Malcolmson competed in the speed trials amounted to negligence. We submit that with regard to the doctrine of volenti non fit injuria, the law is correctly stated in Broom's Legal Maxims (7th edition), p. 220, "Wrongdoers who endanger the use of a highway are, as a rule, responsible for injuries thereby caused to a person using it with some knowledge of the danger, but doing no act which, having regard to that knowledge, can be considered unreasonable."

There is no evidence whatever that the deceased knew of the slightest illegality in the holding of this competition.

We submit there must be a new trial, but limited to the question of damages.

Cur. adv. vult.

May 11

Moore L.J. : This matter came before us on a notice of motion served by the defendant James Malcolmson that judgment in the action be entered for him, a second notice of motion to the like effect by the remaining defendants, and a cross-notice by the plaintiff asking for an order for a new trial of the action.

The action was brought by Agnes McKee, mother of Harry McKee, under the Fatal Accidents Act, 1846 (Lord

(1) 21 Q.B.D. 220

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Campbell's Act). At the trial before the Lord Chief Justice and a Common Jury it appeared that Malcolmson took part in motor bicycle trials organised by the other defendants, and held on the public road leading from Bangor to Newtownards, and that while Malcolmson was competing in the race his bicycle struck Harry McKee and killed him. There was some conflict of evidence as to whether Harry McKee was in the position of a mere passer-by, or on the other hand a participant in the competition as spectator to whatever extent was thereby implied, and it was admitted that, being held on the highway without the sanction of the proper authority, the meeting was illegal.

The Lord Chief Justice left the following questions to the jury, and they found in reply as follows:—(1) Was the defendant Malcolmson guilty of negligence in the driving, management or control of his motor bicycle? Answer: no. (2) Did the holding of motor bicycle speed trials render the highway on which they were held dangerous for persons lawfully using same? Answer: yes. (3) Was the said highway unfit for the holding of motor speed trials? Answer: yes. (4) Were the defendants other than Malcolmson guilty of negligence: (a) In inducing or permitting the said Malcolmson to drive a motor bicycle at a dangerous or excessive speed over the said highway? Answer: yes. (b) In inducing or permitting the said Malcolmson to race with another cyclist on the said highway when persons, including Harry McKee, were standing on the said highway? Answer: yes. And if the answer to Question No. 3 is in the affirmative: (c) In permitting or inducing motor bicycles to be driven at racing speed along the said highway in its then condition? Answer: yes. (5) Was the said Harry McKee at the time he was struck: (a) Attending the said speed trials as a spectator? Answer: yes. (b) Lawfully on the said highway? Answer: yes. (6) Did the said Harry McKee (a) Understand the risk he was running? Answer: yes. (b) And did he voluntarily incur such risk? Answer: yes. (7) Was the said Harry McKee guilty of negligence? Answer: no. If so—(8) Could the defendant Malcolmson by the exercise of reasonable care have avoided the consequence of McKee's negligence? Not

answered. (9) Could the defendants other than Malcolmson by the exercise of reasonable care have avoided the consequence of McKee's negligence? Not answered. (10) Damages?

We have had considerable argument and much assistance from counsel, but the case has been narrowed down to a couple of issues.

The statement of claim up to paragraph 7 contains counts in respect of nuisance created on a highway, by the defendants other than Malcolmson, in holding the competition, and by Malcolmson himself for creating a nuisance in driving at an excessive speed and in a manner dangerous to persons using the highway. Alternatively (par. 8) there is a claim against all and each of the defendants in negligence.

The jury in answer to Question 1 have found that Malcolmson was not negligent, and in answer to Question 4 that the defendants were negligent—(a) in inducing Malcolmson to drive at excessive speed on the highway; (b) in inducing him to race while McKee was standing on the highway; (c) in holding the races on the highway in its then condition. In reply to Question 2 they found that the holding of motor bicycle speed trials rendered the highway on which they were held dangerous for persons lawfully using the same.

I entertain no doubt whatsoever that this answer by the jury amounts to a finding that the competition in which the defendants took their respective parts was a nuisance in law.

It did not require the luminous judgment of McCardie J. in *Davell* v. *Cotgrove* (1) to establish this proposition. The English common law has always protected the public rights of the King's private subjects to pass and repass safely upon the King's highway upon their lawful occasions. Any interference with this right may be matter for indictment, and in law constitutes a nuisance. I do not propose to elaborate this view, as in my judgment it is elementary law.

(1) 88 J.P. 856

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It is therefore conclusively established that this unfortunate lad, Harry McKee, was killed by reason of the nuisance created and carried on by the defendants in their respective capacities.

But to this two defences have been raised. Firstly, that Harry McKee (see Question 6) understood the risk he was running and voluntarily incurred such risk, and the jury have so found; secondly, that the defendants were engaged in an unlawful undertaking, and that Harry McKee participated in the illegality as a spectator (see answer to Question 5 (a)) in such a manner as prevents his mother now recovering any contribution from those associated with him in the illegality.

Let us now examine these contentions in turn.

As to the first, the immediate cause of the accident was that the highway was unfit for the holding of motor speed trials. In other words, it was dangerous. John McKee says " Holes in road and shingle there." James McKee in his evidence says, " Second event—fifty miles, very fast. Mr. Malcolmson right towards Newtownards; about forty yards away he hit a rut, began to zig-zag, dashed into ditch, on that side of road some ruts. He got too wide, and got into ruts, centre good." For defence, John Gorman, a steward, "saw accident; front wheel of Malcolmson wobbled and he dashed in." Cross-examined, " speed wobble very difficult to correct, small obstruction or a hole will start it." Malcolmson, the rider, says, " Beyond cross roads hit bump or pot hole, got speed wobble." Cross-examined, " going well over 45 an hour; I hit bump or pot hole." It is urged that the maxim, volenti non fit injuria, applies here. The jury have certainly found that McKee understood the risk, and that he voluntarily incurred it. But is there a particle of evidence to justify the first of these findings? The deceased was entitled to assume that the highway was reasonable safe for the purpose for which the defendants were using it. There is no suggestion that he personally was familiar with or had any knowledge of the locus in quo. There is further the additional evidence that, while the highway was in fact dangerous, those who took control of it and were familiar with it themselves believed it to be safe. Gorman says, " surface of road quite right,

steam rolled;" and on cross-examination, "I thought side of road safe for spectators before the accident, but not now." Mr. Wright, secretary to the Ulster Branch of the defendants' Association, "examined this road. It was in good order." Mr. Uprichard, a delegate, "present at races to see road. Saw it day of races, road in good order, no heights or bump at all." Sergt. Mundy, "The surface there for half a mile in good condition." Malcolmson, "the course was in good condition, but not at that spot." I ask myself, if all these people who were naturally making themselves responsible for the safety of the meeting were not aware that in fact at this place the road was dangerous, how could it be supposed that this young artisan living ten miles away in Sandown Street, Belfast, could have known of the danger. Lord Justice Bowen in *Thomas* v. *Quartermaine* (1) points out that the maxim is not "Scienti non fit injuria," but "Volenti non fit injuria," a dictum frequently referred to with approval. It is not enough to prove that the plaintiff was sciens, but one must go further and prove that he was volens. This is because, while one may be sciens without being volens, it is impossible to be volens without being sciens. In *Smith* v. *Baker* (2), at p. 338, Lord Halsbury says, "In order to defeat a plaintiff's right by the application of the maxim relied on . . . the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself." In my opinion there is not a shred of evidence in the present case to show that Harry McKee was aware of the risk arising from the dangerous state of the road, and therefore that the findings of the jury in reply to Question 6 cannot be sustained.

There remains the other defence based on the finding of the jury in answer to Question 6 (a), viz., that the deceased was present as spectator. This defence assumes that "spectator" implies at least that McKee was taking such an interest in the illegal proceedings of the day as to make himself particeps criminis with the defendants, and there-

(1) 18 Q.B.D. 685. (2) [1891] A.C. 325.

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fore incapable of suing them. This is expressed in the application for a direction made by counsel for Malcolmson, and also by counsel for the other defendants. "Deceased was a co tort-feasor with Mr. Malcolmson and therefore can not recover damages against him," and Mr. Williamson includes the other defendants in his requisition. Spectator is a word of doubtful meaning, but for the sake of argument I will assume it to mean that he was taking an active interest in the proceedings; it certainly cannot, however, go so far as to imply that he was anything in the nature of an organiser, still less a competitor.

This competition was wholly illegal. But it is only fair to the defendants to say it is abundantly plain that it was conducted in a perfectly open and bona fide manner in apparent unconsciousness of any illegality. The police were present; I do not know if the correspondence beforehand with them which I find in the Appeal Book was in evidence or not, so I shall not further refer to it, but there is evidence that the event was advertised in the Bangor paper. The public were quite entitled to assume that everything had been done by those in charge to legalise it by obtaining all necessary sanctions.

Harry McKee, whose previous acquaintanceship with any of the defendants is not suggested, was equally entitled to assume that they were not acting in breach of the law. The general rule that one tort-feasor can not sue a joint tort-feasor for contribution or indemnity arising out of their joint wrong has its limitation, and they have been discussed in recent years. One of these limitations was laid down so long ago as 1827 in *Adamson* v. *Jarvis* (1). There a person without title falsely represented to an auctioneer that he was the owner of certain cattle and stock, and requested him to sell them. The auctioneer did so in good faith. The real owner, Somersett, sued him for the value of the goods, and recovered the amount. The auctioneer then sued the defendant who falsely misrepresented his authority. The defendant pleaded that the auctioneer being a joint tort-feasor with himself could

(1) 4 Bingham 66.

not recover, relying on an earlier decision of Lord Kenyon in *Merryweather* v. *Nixan* (1). But Best C.J., referring to this authority, says, " from reason, justice and sound policy, the rule that wrong doers can not have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

This passage is quoted by Lord Herschell L.C., with approval, in *Palmer* v. *Wick & Pulteney Town Steam Shipping Company* (2), at p. 324, and by Bruce J. in *The Englishman and The Australia* (3), and again by Grantham J. in *Burrows* v. *Rhodes* (4) at p. 825. Applying this limitation to the present case, I can see no reason for holding that McKee should be presumed as spectator to have known that the organisers of the meeting were doing an act which was unlawful without proper sanction obtained.

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I therefore think that both defences fail, and that the plaintiff is entitled to judgment. The jury have not assessed the amount of damage, and under Order XL. we will send the case back for a new trial to assess damages only. It would not be right to permit the defendants to raise new issues, if there are any, and our judgment of to-day has concluded those which have been raised, with the single exception of that of the amount to be recovered. The plaintiff shall have judgment for that amount when ascertained, with her costs of the action and of this appeal.

ANDREWS L.J. The plaintiff's claim against all the defendants is framed in nuisance and negligence. Both causes of action are traversed in the defence. It was alleged by counsel for the defendants in opening the hearing before us that the word " nuisance " was never used throughout the trial, except when at the close Mr. McGonigal, for the defendant Malcolmson, asked for a direction in favour of his client upon that issue. Counsel submitted that in these circumstances the claim in nuisance must be taken to have been abandoned, and, as further

(1) 8 T.R. 186
(2) [1894] A.C. 318
(3) [1895] P.D. 217.
(4) [1899] 1 Q.B. 816.

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evidence of this, referred to the questions submitted to the jury by the Lord Chief Justice, none of which, he alleged, was based on nuisance. I am quite unable to accept this view. Much of the evidence contained in the notes of the learned judge is more relevant on the issue of nuisance than it would be on that of negligence. The fact that counsel for the defendants other than Malcolmson abstained from asking for a direction upon the nuisance count shows their appreciation that such evidence had been given. Further, I am quite satisfied that Question 2, as to whether the holding of the speed trials rendered the highway dangerous for persons lawfully using the same, was framed solely in nuisance. The affirmative answer given to that question by the jury affects all the defendants; and, when its true meaning is appreciated, it seems to me to constitute a complete answer to much of the argument which was addressed to us by Mr. McGonigal. This answer is not challenged in any of the several notices of motion before us, and it is, indeed, unchallengeable, as it is amply supported by the evidence.

Before considering any question of law which may arise it will be convenient to turn to the other questions submitted to the jury with their answers, bearing in mind that no exception has been taken to the jury's findings upon any of the questions other than Nos. 1, 5, and 6.

In answer to Question 1, the jury found that the defendant Malcolmson was not guilty of negligence in the driving, management, or control of his motor bicycle. This question was obviously framed on the averment of negligence contained in paragraph 8 of the statement of claim. Paragraphs 3 to 6 dealt with nuisance, paragraph 7 with the defendant Malcolmson's excessive speed, and I think paragraph 8 was intended to relate to his negligence in other respects than mere speed. The answer to Question 1 really means that in the opinion of the jury he was in no such other respect guilty of negligence, and I can find no evidence of any such other negligence. The jury's answer must therefore stand. I have already dealt with Question 2. In answer to Question 3, the jury found that the highway was unfit for the holding of motor speed

trials. In reply to Question 4, they found negligence on the part of the defendants other than Malcolmson in inducing or permitting Malcolmson to drive at a dangerous or excessive speed, and to race with another cyclist on the highway, and also in permitting or inducing motor bicycles to be driven at racing speed along the said highway.

This brings me to Questions 5 (a) and (b), where the jury have found that the deceased was attending the speed trials as a spectator, but that he was lawfully on the highway. The first portion of this answer is challenged by the plaintiff on the ground that there is no evidence to support it, or, alternatively, that it is against evidence and the weight of evidence. My first comment upon this is that no exception was taken on behalf of the plaintiff to the learned judge leaving the question to the jury, and no direction was asked upon it. Further, even a superficial glance at the notes of the trial shows that the finding was amply justified by the evidence, and I do not hestitate to say that as a juror I would have arrived at the same conclusion. The perusal of the advertisement of the speed trials in the Press, followed by the adoption of this rather unusual route to Bangor, the puncture in the immediate locality of the races, the diversion along the Ballysallagh Road to obtain repair material, the purchase of the sports programme, the alleged fortuitous meeting at the races with the brother James, whose journey to Newtownards also brought him by this circuitous route to the same spot at practically the same psychological moment—the commencement of the races—constitute too strong a concatenation of circumstances to lead me to any other conclusion than that the deceased came to and attended the races as a spectator. At the same time the jury were quite within their rights in finding that the deceased was lawfully on the highway. He had nothing to do with the promotion of the meeting, and his presence caused no obstruction to the lawful use of the highway by the public.

The defendants rely strongly upon the jury's finding that the deceased attended as a spectator—firstly, because they contend that this makes him a joint tort-feasor, and, accordingly, bars his right of recovery, and secondly,

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because it shows that he was volens as well as sciens of the risk. The first of these contentions does not bear examination. If it were right the startling result would follow that a third party, who was injured by one of the competitors whilst lawfully using the highway without any previous knowledge of the trials, could sue any person who "attended as a spectator," such person being ex hypothesi a joint tort-feaser with the promoters of the race meeting. I cannot subscribe to any principle involving such an absurd conclusion. The fallacy which underlies the suggestion that the promoters and spectators are joint tort-feasors is that it wrongly assumes that they are guilty of a single common unlawful act. It was unlawful to promote an unauthorised race meeting of this character on the public highway, and the illegality extended to and embraced the competitors, without whose co-operation there would have been no race, and, therefore, no danger to the public. The promoters and competitors, therefore, combined to create what was a single legal nuisance, and either or both could be sued by an injured party (as common joint tort-feasors). But the position of a person who attended these trials as a spectator was wholly different. He took no part with the promoters in the preliminary organisation of the meeting, or in the management and control on the day on which it was held. His presence was in no sense requisite for the meeting, which could, indeed, have been held with less trouble to the promoters and greater safety to the competitors had none of the public attended. As no charge was made for viewing the races, spectators did not even provide this modicum of financial support. True, it may be, that the public might assemble in such large numbers at a meeting of this character that they would cause such an obstruction on the highway as might constitute an independent legal nuisance. There is no allegation, proof, or finding of any such nuisance in the present case: indeed, it is negatived by the finding that the deceased was lawfully on the highway; but, even if such a nuisance were found, it would, in my opinion, be in law sufficiently independent of the nuisance caused by the promoters and competitors to prevent the application of any principle of the law relating to joint tort-feasors

Passing to the second submission of the defendants, based on the jury's answer that the deceased attended as a spectator, I agree that it establishes as against the plaintiff that the deceased's presence was a purely voluntary act; and I am satisfied, therefore, that if he had knowledge of the risk that he was running he voluntarily undertook it.

This brings me to the answer to Question 6, in which the jury have found that the deceased, Harry McKee, both understood and voluntarily undertook the risk he was running. Mr. Pringle, for the plaintiff, objected at the trial to this question being left to the jury, on the ground that no evidence had been given on behalf of any of the defendants to support it. As the same view has been strenuously submitted before us, it is our duty carefully to examine the relevant evidence in the case; but, before doing so, it will be convenient to consider briefly the legal aspect of this principle of volenti non fit injuria.

In my experience there are few legal maxims which have been as frequently misunderstood. Sometimes it is confused with the issue of contributory negligence; sometimes it is regarded as being involved in the question of the defendant's negligence, *Thomas* v. *Quartermaine* (1) (at p. 695), though for my part I prefer to treat it as an issue distinct in itself; sometimes its application has been unduly restricted to cases of master and servant, probably because that is undoubtedly the class of case in which it most frequently arises (see speech of Lord Halsbury C. in *Smith* v. *Baker* (2) (at p. 337); sometimes "volenti" has been wrongly interpreted as if it were "scienti"; and lastly, there has been at times a disregard of the true nature of the risk which must be appreciated by the plaintiff before the principle can be held to apply.

It is on this latter aspect alone that I find it necessary to say a few words in the present case. Knowledge of the danger requisite to constitute a defence must not merely be that there is some degree of risk involved; there must be an appreciation of its full extent. As Bowen L.J.

(1) 18 Q.B.D 685 (2) [1891] A.C. 325.

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said in *Thomas* v. *Quartermaine* (1), at p. 696 :—" There may be a perception of the existence of the danger without comprehension of the risk : as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent." Again at p. 699, the same learned judge adds :—" Knowledge, as we have seen, is not conclusive, where it is consistent with the facts that, from its imperfect character or otherwise, the entire risk, though in one sense known, was not voluntarily encountered." Wills J. was referring to the same necessity for full knowledge when in *Osborne* v. *London & North Western Railway Company* (1) he said (at p. 223-4) :—" It seems to me to follow that in such a case as the present, where the existence of negligence on the part of the defendants and the absence of contributory negligence on the part of the plaintiff are specifically found as matters of fact, if the defendants desire to succeed on the ground that the maxim, ' Volenti non fit injuria,' is applicable, they must obtain a finding of fact ' that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.' "

With the clear establishment of this general principle as to the necessity for proof by the defendant of the plaintiff's full and appreciated knowledge, we must, in the next place, guard ourselves against approaching the case with any such bias as might naturally flow from the fact that it is a matter of common knowledge that accidents do occur at motor speed contests to both riders and spectators; for I venture to think that in the vast majority of cases injuries to spectators are caused either by overcrowding at dangerous corners or by their encroaching on the racing track, neither of which dangerous practices could be laid to the charge of the deceased in the present case.

With this word of caution I turn to the evidence as set out in the notes of the learned Lord Chief Justice. It is quite clear to my mind that this evidence wholly fails to bring the case within the principle contended for. It may be that the defendants are handicapped by the fact that, owing to death from his injuries, there could be no

(1) 18 Q.B.D. 685. (2) 21 Q.B.D. 220

cross-examination of the deceased as to his knowledge of danger or as to his appreciation of risk; but this circumstance of possible hardship cannot affect the application of the established law. In his absence an unsuccessful attempt was made to obtain evidence of such knowledge on the cross-examination of the deceased's brothers. But the strength of the plaintiff's case on this issue lies, in my opinion, in the evidence given by the witnesses for the defence. James Patton, who was riding with Malcolmson, but slightly behind him, proved that, though he had been riding for eight years, he had had no accident before this, and never saw any. This helps to confirm what is to my mind quite clear, that the accident would never have taken place had it not been for Malcolmson's bicycle striking a pot-hole or rut upon the road, which set up what is technically known as a speed-wobble, under which the bicycle became uncontrollable. James Gorman, a steward of the meeting, and, accordingly, an agent of the defendants other than Malcolmson, apparently had no knowledge or appreciation of risk or danger from this cause, as he said that the surface of the road which had been steam-rolled was right. "I thought," he adds, "the side of the road safe for spectators before the accident, but not now." Mr. Wright, the secretary of the Ulster Branch of the Motor Cycling Union of Ireland, who had examined the road, considered it was in good order. Mr. Uprichard, one of the delegates, added his testimony that the road was in good order with no heights or bump at all; and Malcolmson, whilst speaking of the course generally as being in good condition, qualified this by adding "but not at that spot," this qualification being apparently made in consequence of the existence of at least the one pot-hole or bump which he says he struck.

If this be the evidence of the defendants' witnesses, who must have had a much more intimate knowledge of the road and of any possible danger than the deceased, Mr. Murphy asks with great force what justification was there for the jury imputing a knowledge of danger to a youthful and inexperienced spectator and a stranger to the locality, which was not possessed by the officials of the club who organised the meeting, and who evidently considered there

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was no risk in allowing spectators to view the races from the grass verge at the roadside; for, although it is true that the cross-roads were roped off, this, I gather, was merely a wise precaution to prevent traffic coming suddenly and unawares on the road on which the races were being held, and there is no suggestion that in standing where he did the deceased was acting contrary to the directions of the club's officials.

I have, accordingly, no difficulty in holding, following the lines of the judgment of Lord Bramwell in *Smith* v. *Baker* (1), at p. 345, that even if the deceased was volens to encounter the natural dangers or ordinary risks of the race, he was not volens to those which were superadded by the race being held upon a road which was admittedly defective at the point where the accident occurred. How can the deceased be held to have voluntarily incurred a danger from a defective road, of the defective character of which he was not aware ? (See speech of Lord Morris at p. 370). It was the defendants' duty so to carry on their speed trials as not to expose the spectators, whom they had reason to expect would be present, to unnecessary risk.

In these circumstances, the plaintiff's counsel was in my opinion fully justified in asking that Question 6 as to acceptance of risk should not be put to the jury, as there was no evidence to support it. The finding of the jury in nuisance must stand, the jury have negatived contributory negligence, and the plaintiff is, therefore, entitled to a verdict. As there has, however, been no provisional assessment of damages by the jury, the case must go before another jury, unless the parties can avoid the additional costs and expense by adopting the course suggested by the Court during the argument, and agreeing upon the amount of damages (2).

Solicitors for the defendant James V. C. Malcolmson: *H. and W. Mahaffy.*

Solicitors for the plaintiff: *Martin H. Turnbull and Co.*

Solicitor for the other defendants: *John McKee.*

(1) [1891] A.C. 325.

(2) [The parties subsequently fixed the damages at £350. Ed.]

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MACAURA v. THE NORTHERN ASSURANCE COMPANY, LIMITED.

Insurance—Insurable Interest—Insurance of Company's assets by sole shareholder—Reference to arbitration—Jurisdiction by arbitrator.

The plaintiff, the owner of a timber estate, sold the whole of the timber to a company. Some of the timber was felled and some unfelled. The total price paid was £42,000, and this was satisfied by the allotment to the plaintiff, or his nominees of £42,000 fully paid £1 shares in the company, being all the issued shares. The company cut down the timber, and during the course of this work the plaintiff had become a creditor of the company for a sum of £19,000. The timber remained lying on the plantiff's land, and was destroyed by fire on February 22, 1922. The plaintiff had subsequently to the sale to the company insured this timber against fire by policies which he had effected in his own name with a number of insurance companies, and he claimed against the companies on the policies. The matter was referred to arbitration, and the arbitrator by an award stated in the form of a special case, awarded (inter alia) that the appellant had not at any time during the currency of the policies any insurable interest in the timber, the subject matter of the policies.

Held by the Court of Appeal (Moore and Andrews L.JJ.) affirming the judgment of the King's Bench Division (Sir Denis Henry, Bart. C.J. and Brown J.) that the award should be upheld on the ground that the plaintiff had no insurable interest in the timber destroyed.

SPECIAL CASE stated by James Pringle K.C. appointed sole arbitrator by plaintiffs and defendants in pursuance of the provisions of clause 13 of a Policy of Assurance dated 6th February, 1922.

The case stated so far as material was as follows :—

Prior to the 30th December, 1919, the claimant Gerald J. Macaura was the owner of the Killymoon Estate in the County Tyrone with the timber thereon, some of which was felled and some unfelled.

By indenture dated the 30th day of December, 1919, and made between the Irish Canadian Saw Mills, Ltd. (hereinafter called the Canadian Company) of the one part and the said Gerald J. Macaura of the other part, the said

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Gerald J. Macaura agreed to sell all the timber both felled and standing on the said estate to the Canadian Company for the sum of £27,000, and in addition the actual cost incurred by the said Gerald J. Macaura in felling the timber already felled and that the said sum of £27,000 should be satisfied by the issue and allotment to the said Gerald J. Macaura or his nominees of 27,000 shares of the Canadian Company credited as fully paid, and that the cost of felling the timber already felled should be paid in cash or satisfied by the allotment to the said Gerald J. Macaura or his nominees of shares in the Canadian Company as fully paid or partly in one way and partly in the other at the option of the said Gerald J. Macaura, and that the purchase should be completed forthwith when the allotment of the said 27,000 shares should be made to the said Gerald J. Macaura or his nominees, and that the said Gerald J. Macaura should deliver to the Canadian Company all the felled timber.

By a further indenture of 30th December, 1919, and made between the said Canadian Company and the said Gerald J. Macaura, the said Gerald J. Macaura for the consideration therein granted to the Canadian Company leave and licence for the period of one year from the date thereof to enter upon the the said estate and to occupy and use for the purpose of sawing the timber upon the said estate all mills upon the said estate.

In pursuance of the said first mentioned indenture of 30th December, 1919, 42,000 fully paid shares in the Canadian Company were issued and allotted to the said Gerald J. Macaura or his nominess, being 27,000 shares in respect of the said purchase price and 15,000 shares in respect of the cost incurred by the said Gerald J. Macaura in felling timber. The said 27,000 shares and 15,000 shares, making together 42,000 shares, are the only issued shares of the Canadian Company, and same are now and have always been held by the said Gerald J. Macaura or by his nominees for his benefit. The only assets of the said Canadian Company at any time were the said timber, some chattels of small value connected with their business, and the licence given to them by the indenture of 30th December, 1919.

Prior to the 30th December, 1919, the said Gerald J. Macaura had erected a steam driven saw mill upon the said estate, and within three months after the execution of the said indenture of 30th December, 1919, the Canadian Company entered into occupation of the said saw mill, and took delivery of the felled timber. The said Canadian Company also proceeded to fell the standing timber, and in the month of August, 1921, the Canadian Company had felled practically all the standing timber on the estate and had completed the sawing in the saw mill of all the felled timber.

During the year 1920 and up to the date of the hearing before me the said Gerald J. Macaura was indebted by way of overdraft to the Bank of Ireland (Cookstown Branch), as security for the amount due to the said bank the said Gerald J. Macaura in the year 1920 lodged with the said bank the title deeds of said Killymoon Estate, and same are still held by the said bank.

On the 12th day of June, 1922, the claimants instituted an action in the High Court of Justice in Northern Ireland against the defendants for the recovery of monies alleged to be due on foot of the said policy, and by order dated 21st July, 1922, and made in said action it was ordered that all proceedings in said action should be stayed and that the matter in dispute be referred to arbitration in pursuance of Condition 13 of said policy, and the parties so consenting that the cost of both parties of said action and of and incidental to the order for discovery of documents and of the application to stay proceedings and the order thereon should form part of the respective parties' costs of the reference and award.

By writing dated the 5th day of October, 1922, the claimants and the defendants appointed me as sole arbitrator in pursuance of the provisions of clause 13 of the said policy of insurance dated 6th February, 1922.

On the hearing before me the following points were urged by counsel on behalf of the defendants :—

(*a*) That the claimant Gerald J. Macaura had not any insurable interest in the timber the subject matter of the said policy.

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(*b*) That the loss was not within the risk insured against by reason of the timber which was burned being at the time of the burning thereof within 100 yards of a saw mill within the meaning of the words "Saw Mill" in the first paragraph of the specification attached to the said policy.

It was agreed between the parties that the Bank of Ireland could only have an insurable interest in said timber if Gerald J. Macaura had an insurable interest therein.

At the request of counsel on behalf of the claimants and defendants respectively I make my award in the form of a case in order that the opinion of the Court may be taken on the said points, and by agreement between the parties the book and documents set out in the schedule hereto are referred to and are to be taken as incorporated herein.

The Arbitrator by his award in the form of a special case awarded that the said Gerald J. Macaura had not at any time during the currency of the said policy any insurable interest in the timber the subject matter of the said policy.

March 29th

SIR DENIS HENRY C.J., delivering the judgment of the King's Bench Division (1), said: This case originally arose under an award in the form of a special case stated by James A. Pringle, Esq., K.C., the arbitrator selected by the parties on the 27th November, 1922, and pending the hearing of the special case a notice of motion, dated 13th December, 1922, was served asking to have the award set aside on six grounds, which are fully set out in the notice of motion, and for an order remitting the matter to the arbitrator to assess the amount to which the claimants are entitled.

A further notice of motion, dated 8th January, 1923, was served which asked for the same relief, but added an additional ground on which reliance was placed, viz.:—

"That the arbitrator's jurisdiction was terminated by the repudiation of the policy on the grounds of fraud put forward by the defendants."

(1) In the King's Bench Division before Sir Denis Henry, Bart., C.J., and Brown, J.

It also asked that the order by consent, made the 21st July, 1922, staying the actions be set aside, and that the plaintiffs be at liberty to proceed therewith. This application is provided for by sec. 14 C.L.P. Act, 1856.

On the 12th June, 1922, the claimants instituted actions on foot of a number of policies of insurance containing arbitration clauses, and on the 21st July an order was made staying the actions and directing the matters in dispute to be referred to arbitration.

On the 5th October, 1922, the Northern Assurance Company and the claimants appointed Mr. James Pringle, K.C., to act as sole arbitrator under condition 13 of the policy, and similar documents were signed in the case of the other companies.

The arbitrator seems to have held his first sitting on the 5th October, 1922, and afterwards sat on 6th October, 7th October, and 9th October, ultimately making his award on 27th November, 1922.

One of the main questions argued on behalf of the applicants was that the arbitrator's jurisdiction was terminated on the grounds of fraud put forward by the defendants, and reliance was placed on the well-known case of *Jureidini* v. *National British and Irish Millers Insurance Company, Ltd.* (1). There the question arose on the pleadings in the action, and after the verdict of the jury application was made by the defendants, relying on their condition to the Court of Appeal, who decided in their favour, and were in the end reversed by the House of Lords.

Here an order had been made staying the action and an appointment had been made by the parties of a sole arbitrator, and he on the 5th October entered on the reference. It is contended that he should during the progress of the case have stopped and declined to proceed, but the claimants went on until the end; they gave evidence of damage, and in the end they were successful, save on the question of insurable interest.

The arbitration closed on the 9th October, and a considerable period elapsed before the award was made, and no step was taken either under sec. 14 of C.L.P. Act, 1856, or otherwise to quarrel with the action of the arbitrator. The award was made as arranged, in the form

(1) [1915] A.C. 499.

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of a special case which was signed by the solicitors on both sides and duly lodged, and on the 13th December, 1922, a notice of motion to set aside the award was served. This contained no reference to the main question argued before us, viz., that the arbitrator's jurisdiction was terminated by the allegations of fraud, and it is not until the 8th January, 1923—three months after the termination of the hearing—that this case is put forward. In my opinion no case has been made in the present case bringing it within the decision in Jureidini's case (1), and the arbitrator's jurisdiction was not terminated.

[The Lord Chief Justice dealt with other grounds set out in the notice of motion which are not material to this report, and proceeded as follows :—

It appears that the timber, the subject matter of the insurance, in circumstances that are set out in the early paragraphs of the case stated, had become the property of a company known as The Canadian Company, and 42,000 fully paid shares in the said company were issued and allotted to Mr. Macaura or his nominees. The said 27,000 and 15,000 shares, making 42,000 shares, are the only issued shares of the Canadian Company, and have always been held by the said Gerald J. Macaura or by his nominees for his benefit.

The case proceeds to set out the circumstances in which the policies sued on were effected, but suffice it to say that he held the shares as above described at the time the policies were effected, and was also a creditor of the Canadian Company for £19,000.

Serjeant Sullivan has contended that both in his capacity as shareholder and as a creditor Mr. Macaura had an insurable interest in the timber, and he has referred to a number of authorities. The first of these was the case of *Lucena* v. *Craufurd* (2), from which he cited the judgment of Mr. Justice Lawrence on the general question of insurable interest. He also referred to the case of *London & N.W. Rly.* v. *Glyn* (3), a case of insurance by common carriers of goods in their warehouse. The case of *Pater-*

(1) [1915] A.C. 499.
(2) 1 Bos. & Pul. 75.
(3) 1 E. & E. 652.

son v. *Harris* (1) was also cited. There a share in the Atlantic Telegraph Company had been insured by the plaintiff, but there was no insurance such as here of the property of the company. *Wilson* v. *Jones* (2) was also referred to. Serjeant Sullivan called attention to the report of the same case in the Law Journal, and read the judgment of Mr. Justice Willis therefrom. The basis of the decision in the Exchequer Chamber appears in the marginal note. Held first that the policy was not on the cable, but on the plaintiff's interest in the adventure that is on the profits to be derived by him from the success of the adventure, and secondly that such an interest was an insurable interest.

None of the cases goes the length of establishing the right of the shareholder to single out specific assets of a company and to insure them as if they were his own. We are of opinion that no such right exists, and that so far as Mr. Macaura's ownership of shares is concerned he had no insurable interest in the timber.

The claim on behalf of Mr. Macaura as an ordinary unsecured creditor is still more difficult. In *Moran Galloway & Co.*, v. *Uzielli* (3) Mr. Justice Walton says:—" In so far as the plaintiff's claim depends upon the fact that they were ordinary unsecured creditors of the shipowners for an ordinary unsecured debt I am satisfied that it must fail. The probability that if the debtors' ship should be lost he would be less able to pay his debts does not in my judgment give to the creditor any interest legal or equitable which is dependent upon the safe arrival of the ship."

We agree with the view of the learned arbitrator that the existence of the debt of £19,000 did not give the claimant an insurable interest in the company's timber.

The last question put by the arbitrator is:—" At the time of the loss, 22nd February, 1922, was the building which had been used as a saw mill prior to August, 1921, a saw mill within the meaning of the words ' Saw Mill ' in the said policy?" The arbitrator finds:—"That the said timber or any part thereof was not at the time of the burning within 100 yards of any saw mill within the meaning of the words 'saw mill' in the said policy."

(1) 1 B. & S. 336.
(2) L.R. 1 Ex. 193 & L.R. 2 Ex. 139.
(3) [1905] 2 K.B. 555 at p. 562.

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It is obvious the conclusion the arbitrator came to was that the saw mill had ceased to be a saw mill before August 1921, and on the evidence before him it was quite open for him to arrive at that conclusion.

We accordingly answer question (1) (*a*) and (*b*) in the negative and question 2 also in the negative.

The plaintiff Macaura appealed to the Court of Appeal of Northern Ireland (1).

Serjeant Sullivan K.C., Herbert Wilson K.C., John McGonigal K.C. and *McGuckin* for the appellant :—

Up to the present the principle which prevents an insurance under the Common Law and under statute from being void as a gambling and wagering transaction, is, if the insured person stands in such a relation to the property insured, that its preservation as a moral certainty must be for his benefit, and that its loss as a moral certainty must be to his prejudice, then he has an insurable interest in the property. If it is only a matter of probability, then it is a gambling transaction, and there can be no insurable interest in the property, unless the insurer stands in a certain legal relationship such as that of a trustee or bailee; if not it is a gambling transaction, and the policy is void. A shareholder is entitled to insure to preserve the value of his shares. The timber was the company's property, but in fact the company was Macaura. The Lord Chief Justice's judgment does not completely represent our argument. There was no person having any interest whatever in this timber. On the authorities Macaura had an insurable interest in the timber. *Lucena* v. *Craufurd* (2), *Moran Galloway & Co.* v. *Uzielli* (3), *Wilson* v. *Jones* (4), *London & North Western Railway Company* v. *Glyn* (5), *Paterson* v. *Harris* (6), *Inglis* v. *Stock* (7).

Serjeant Hanna K.C., S. L. Brown K.C., E. S. Murphy K.C. and *W. Lowry* for the respondents :—

(1) In the Court of Appeal before Moore and Andrews, L.JJ.
(2) 3 Bos. & Pul. 75, 2 Bos. & Pul. (N.R.) 269.
(3) [1905] 2 K.B. 555. (4) L.R. 1 Ex. 193 and L.R. 2 Ex. 139
(5) 1 El. & El. 652. (6) 1 B. & S. 226 (7) 10 A.C. 263

What was insured was the property, not the loss the plaintiff would sustain as a creditor and not his interest as a shareholder. Our construction of the document is that what was insured was the property in the timber to the extent that Macaura or the Bank of Ireland had property in it. We contend that Macaura had no insurable interest in the timber either by reason of being the beneficial owner of all the shares in the Canadian Company or by reason of being a creditor of the company. No case has been cited of a shareholder insuring the property of a company. We rely on the judgment of Lord Eldon in *Lucena* v. *Craufurd* (1). The definition given by Lord Eldon covers every case that has been cited to the Court. A shareholder has no interest in the property of a company in the legal sense. It is only his own interest in a company that a shareholder can insure. We rely on the judgment of Willes J. in *Wilson* v. *Jones* (2) at p. 145.

Inglis v. *Stock* (3) was based on the fact that the sugar the subject matter of the insurance was at the respondent's risk, and therefore he had an insurable interest in it. Every case that has been cited on behalf of the plaintiff is based on contract, and no case has been cited of moral certainty alone. *Moran, Galloway & Co.* v. *Uziellie* (4) is relevant on the question of the position of an usecured creditor. We rely on the judgment of Walton J. at p. 562.

Jureidini v. *National British and Irish Millers' Insurance Company* (5) does not govern the present case. There is no presumption in law that the person who insures has an insurable interest. *Stebbing* v. *Liverpool and London and Globe Insurance Company, Limited* (6), resembles the present case. As a general rule it is not necessary to define the interest to be insured, but there is an exception to that rule within which the present case absolutely falls. It is where the peculiar nature of the risk is such that the risk may be effected thereby, and where it may be said that such interest is itself the subject matter of the insurance, the nature of the interest must be specified, that is where the interest is not a direct interest in the safety of

(1) 2 Bos. & Pul. N.R. 269 at p. 321
(2) L.R. 2 Ex. 139. (3) 10 A.C. 263. (4) [1905] 2 K.B. 555
(5) [1915] A.C. 499 (6) [1917] 2 K.B. 433

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the subject matter, but only a collateral interest, that is to say a prospective advantage to be derived from its continued safety. *Mackenzie* v. *Whiteworth* (1).

That case was referred to in *Dixon* v. *Whitworth* (2) by Lindley L.J. where he says at p. 375, "*Mackenzie* v. *Whiteworth* (1) shews that it is suffcient to specify the subject matter of insurance, and that it is not necessary to describe the assured's interest in it, unless his interest is such as to affect the risk insured against."

The result of the authorities is that where the interest is collateral, it must be specified. We submit that Macaura did not insure the interest he possessed. The insurance company assumed that this timber was the property of Macaura. The company would, we submit, not have insured Macaura's interest at the same premium. It is absolutely necessary in a case of this kind that the subject matter should be accurately described. Macaura has an interest that he could have insured in respect of his share and interest in the Canadian Compay. It was necessary that the insurance company should be specifically informed of the nature of Macaura's interest. As to Macaura's position as an unsecured creditor, we submit that in that capacity he had no insurable interest in the property of the company.

We submit that the arbitrator was right in finding that Macaura had no insurable interest in the subject matter of the policy.

Cur. adv. vult.

July 30th

MOORE, L.J.: This case involves the consideration of a considerable number of documents, but on examination and after the argument before us it would appear that there are only two questions of importance to be decided.

The first of these is that on which the notice of appeal of January 8th in its first three grounds is based, viz.:—

(1) That the arbitrator's jurisdiction was terminated by the repudiation of the policy on the grounds of fraud put forward by the defendants.

(2) That the award is in law bad on its face.

(1) Ex. D. 36, 41, 42. (2) 4 C.P.D. 371

(3) That the arbitrator had no jurisdiction to enter upon enquiry other than in reference to the dispute referred to in the order of the Court dated the 21st day of July, 1922.

The principal fraud alleged against the insurer was that he was himself guilty of the crime of burning the timber the subject matter of the insurance. It is argued for him that on the correspondence it is clear only one matter was in dispute at the date of the order of 21st July, 1922, namely whether or not the saw mill on the premises was in the circumstances a saw mill within the description of the policy, and that this was the only matter referred to in the order sending the parties to arbitration. This being so it is also urged that the plaintiff was taken by surprise at the arbitration, and also that by reason of such charge the jurisdiction of the arbitrator was thereupon ousted. It was further urged upon us that the order staying the action would not have been made if the existence of this as a possible issue at the arbitration had been brought to the notice of the Court.

There is considerable conflict of testimony as to the facts immediately preceding the making of the order of July 21st, but I am satisfied that whether or not a mistake may have been made in the drafting of the order—which the Registrar informs us was settled between counsel for the parties—there was certainly no attempt to mislead the Court.

So far as the plaintiff contends that he was taken by surprise at the hearing it is sufficient to point out that in the result he was in no way damnified as the arbitrator has not arrived at any finding against him on the ground of fraud. Had the arbitrator done so his question in this respect might have been different.

I am not prepared to accept the contention that the Court would not have stayed the actions had the intended charge of fraud (arson) been disclosed. I have known many cases where under the usual submission in policies arbitrators have been permitted to decide the issue as to whether or not the loss was occasional by the criminal act of the assured himself.

But even if it be assumed that in the present case the Court never intended to leave this question to the

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arbitrator (and I only assume this in favour of the plaintiff) what was his course if as he says it was improperly raised before the arbitrator? Obviously to refuse to acknowledge the jurisdiction and thereupon to leave the arbitration and to come back to the Court for an order rescinding the order of July 21st. As pointed out by the Lord Chief Justice in the judgment appealed from the claimants did not do any such thing, but went on until the end of the proceedings, preferring to take their chance of an award, and joined in an application to the arbitrator to state a case on the two law points raised, one as to the mill, the other as to the plaintiff's (Macaura's) insurable interest which assume that as such arbitrator he had power to state such a case and that his jurisdiction was not gone. The solicitors for both parties subsequently joined in the settlement of the case stated, and no attempt was made by the plaintiff to impeach the award of the arbitrator until after the case had been lodged and the first notice was served on December 13th, 1922. In my opinion plaintiff (Macaura) accepted the new situation and deliberately took his chance of success at the hearing, and even now if he obtains a favourable decision on the questions reserved for our consideration he will receive a substantial sum under the award.

Having given full consideration to these facts and also to the fact that the award is good on its face I am of opinion that it cannot be impeached upon any of the foregoing grounds, and that the plaintiff is bound thereby. I entirely concur with what has been said by the Lord Chief Justice on this part of the case.

The remaining questions are accordingly brought before us by the plaintiff on the basis that the award is valid.

The first of them is—

"Had the plaintiff any insurable interest in the said timber by reason

"(*a*) Of his being the beneficial owner of all the shares of the said Canadian Company; or

"(*b*) By reason of his being a creditor of the said company?"

It appears that Gerald Macaura, whom I call "the plaintiff," the then owner of the estate, formed a com-

pany, which I refer to as the Canadian Company, in 1919. The company was incorporated, and had its registered office in Skibbereen. The shareholders were plaintiff's brother Daniel, a Mr. Hayes, plaintiff's father-in-law, Mr. Kavanagh, and plaintiff himself. By indenture of 30th December, 1919, the plaintiff transferred the premises to the company in consideration of 27,000 shares in the company, and subsequently he received a further issue of 15,000 more, and the total of 42,000 shares is the total amount issued by the company. The plaintiff may be taken therefore as the principal if not the sole owner of the shares in the Company.

It also appears that the plaintiff financed the Company, and the Company is now indebted to him in a sum at least of £19,000. I am treating him, therefore, as an unsecured creditor for at least that amount upon the assets of the Company.

In 1920 the Company insured the timber for £7,500 with the Northern Assurance Company.

The plaintiff subsequently, on 6th February, 1922, in his own name entered into the policy with the defendants now sued upon in respect of timber which it must be admitted was in law the property of the Canadian Company, in which he was the principal if not the only shareholder, and of which he was a very large creditor. The question for us is whether in these circumstances he had such an interest in the property of the Canadian Company as entitled him to insure the timber which was destroyed by fire on 22nd February, 1922. We have been referred to a large number of authorities by counsel for the plaintiff.

No explanation satisfactory to me has been offered of the plaintiff's conduct in altering the form of policy in by making himself instead of the Canadian Company a contracting party with the Defendant Company.

If, as he alleges, he was sole owner of all interests in the Canadian Company and the sole creditor of the company it is impossible to see what he would gain by the change. If, on the other hand, he were not the sole creditor, but there were other claims against the Canadian Company it might be to his interest to get the money paid

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directly to himself so as to defeat the claims of other creditors. I only arrive at this in searching for some explanation of his action, but we have no evidence as to the existence of any such claims.

I am of opinion that the timber insured was the property of the Canadian Company, and not in any way of the plaintiff as a shareholder whether to a large or small extent in that company. It would be absurd to suppose that a shareholder in a company as such has any claim to any part of its assets in specie unless the company has definitely contracted with him for such an end. If he has no such right then in my opinion he has no interest in the actual property of the company which is capable of insurance. Would it not be absurd to say that a shareholder in the London Midland and Scottish Railway Company because he was a shareholder could insure in his own name the company's railway hotel in this city and recover for himself in the event of its destruction the policy moneys due under such a contract?

The Canadian Company alone, as owners of the above timber, could on the facts before us insure it. The only method by which plaintiff could protect himself against consequent loss in respect of the timber would be to insure his own interest as shareholder in the Company against loss or depreciation in the value of the shares by reason of any destruction of their assets sustained by the Company. Forms of insurance against such loss whether they are looked on as guarantees or pure insurance are not infrequent.

This would be insurance not of the assets of the company, but of his own share in what has been called "the adventure," which means a share in the profits or losses made or sustained by the Company in their management of the Company's assets and capital.

Serjeant Sullivan has relied on the cases of *Paterson* v. *Harris* (1) and also *Wilson* v. *Jones* (2). I have read and considered these cases, and I have had the advantage of also reading the judgment about to be pronounced of my colleague Lord Justice Andrews on this question, with which I am in full concurrence.

(1) 1 B & S 336, and 2 B & S. 814.
(2) L.R. 1 Ex. 193 & L.R. 2 Ex. 139.

As a result I am of opinion that Plaintiff, whose rights were against the Company, not directly against their assets, had no insurable interest in the timber destroyed qua his position as shareholder in the Canadian Company.

Qua his position as unsecured creditor, I am in concurrence with the judgment of the Lord Chief Justice in the Court below, and consider the law to be as stated in the quotation he gives from Walton J. in *Moran, Galloway & Company* v. *Uzielli* (1), and I think that in this capacity also the plaintiff had no insurable interest directly in the specific chattels of the Canadian Company which were destroyed.

On the remaining question raised by Sergeant Hanna I am of opinion that in the circumstances of the case a disused and dismantled saw mill was not while in that condition a saw mill within the meaning of the conditions in the policy as it could not constitute any element increasing or affecting the risk.

We therefore affirm the orders appealed against with costs of the appeal.

ANDREWS L.J.. The most important question of the many discussed in this case and accordingly the first with which I propose to deal is whether the plaintiff Macaura had any insurable interest in the subject matter insured. To answer this question it is necessary to turn in the first place to the policy in order that we may have a proper appreciation of the precise nature of the property insured. In the body of the policy the subject matter of insurance is briefly referred to as "Property as described in the typewritten specification attached hereto." The specification contains a description of the subject matter as being "Timber and Wood Goods in the open, situate on the Killymoon Demesne," not within one hundred yards of certain specified works and machinery. Nowhere in the policy is the timber referred to, as it in fact was, as the property of the Canadian Company. Indeed, the company is never mentioned throughout. The frame company are never mentioned throughout. The frame of the policy, if not its express terms, treats Macaura and the Bank of Ireland as between them the owners of the timber, though no attempt is made to define their

(1) [1905] 2 K.B. 555 at p. 562.

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respective interests. Nowhere is it hinted or suggested that Macaura's interest was only that of a shareholder in a limited company which was itself both the legal and equitable owner of the timber.

Had Macaura as such shareholder a legal right to insure the company's property? Had he an insurable interest in it? Or was the policy merely a wagering contract?

Persons entitled to insure property may be roughly divided into two classes:—

(1) Those who are the owners of the property which it is intended to insure, and

(2) Those who though not owners are nevertheless so connected with it as to have an insurable interest in it.

To entitle a person to insure as an owner it is of course not necessary that he should be possessd of both legal and equitable interests in the property. Thus both bankrupts and their assignees may insure the bankrupt's property. Both vendors and purchasers of lands under a binding contract of sale may insure pending completion. Trustees and their cestuis que trustent and mortagors and mortgagees may likewise insure by virtue of their respective estates and interests in the property. Illustrations might be multiplied, but it is needless to do so. In all cases it will be found that the parties who have been held to be entitled to insure as owners have a direct legal or equitable interest in the subject matter of the insurance. What then is the position of persons who though not owners fall within the second class? The most common example of such persons are bailees, such as warehousemen, pawnbrokers, carriers, and the like. Although the authorities establish that the right to insure in such cases does not depend upon the existence of any liability on the part of the insurer to the owner of the property, it is I think equally clear that the right to insure only exists where the person seeking such insurance by reason of some statutory provision or some contract express or implied between himself and the owner and relating to the propery will lose some benefit by its destruction or will in some manner be prejudiced thereby. There must, in other words, be some direct and immediate connexion

established by statute or contract between the insured and the property which forms the subject matter of the insurance something which by such means gives the insured some right to or interest in the property. It is upon the existence of such privity or connexion that the insurable interest rests.

We have, however, been pressed by Serjeant Sullivan to give a wider meaning to the term "insurable interest." He contends that if the insured person stands by reason of any circumstances in such a relation to the property insured that its preservation as a moral certainty must be for his benefit, and that its loss as a moral certainty must be to his prejudice he has an insurable interest in that property, and he challenges the production of any case which will throw doubt upon the soundness of his proposition. He relies strongly upon the well-known—I might almost say classic—definition of insurable interest given by Lawrence J. in *Lucena* v. *Craufurd* (1):—

"Interest," he says, "does not necessarily imply a right to the whole, or a part of a thing, not necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring: and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing." These words must, in my opinion, be read in the light of the facts of that case in which, incidentally, it may be observed that Lawrence J. took the view that the insured had no insurable interest. They must also be interpreted more particularly having regard to Serjeant Sullivan's challenge by the speech of Lord Eldon (2) in the same case in the House of Lords, where he expressly refuses to subscribe to the whole of Lawrence J.'s definition:—

"Since the 19th Geo. 2," he says, "it is clear that the insured must have an interest, whatever we understand by that term. In order to distinguish that intermediate

(1) 2 Bos & Pul. (N.R.) 269 at p. 302. (2) At p. 321.

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thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavoured, however, to find a fit definition of that which is between a certainty and an expectation, nor am I able to point out what is an interest unless it be a *right in the property or a right derivable out of some contract about the property* [the italics are my own] which in either case may be lost upon some contingency affecting the possession or enjoyment of the party." Later in his speech he adds the significant words:—"If moral certainty be a ground of insurable interest there are hundreds, perhaps thousands, who would be entitled to insure."

These words, and others could be found to support them, are in my opinion the answer to Serjeant Sullivan's challenge. I accept them in so far as they conflict with the definition given by Lawerence J., both because of their higher authority and also because they correspond with my own view of the principles upon which this law of insurable interest is based. I can well understand the meaning of the expression "legal certainty" to be found in the judgment of Lord Denman C.J. in *M'Swiney* v. *Corporation of Royal Exchange Assurance* (1), but I confess that I have difficulty in finding place for the expression "moral certainty" in a legal proposition. It is at best but a highly probable expectation, and that is something essentially different from an interest legal or equitable.

Let us further test the proposition by a slight modification of the facts of this case. Assume that Macaura owned one-half of the shares of the Company and that another person owned another half the timber constituting the sole assets of the Company. In such event it would be a moral certainty that both Macaura and his fellow shareholder would derive benefit from the continued existence of the timber, prejudice from its destruction. The suggestion must be that in such case both Macaura and his fellow shareholder could insure the timber in a similar form of policy to that adopted in the present case,

(1) 14 Q.B. at p. 645.

and as such form of insurance is on the timber and has no regard to Macaura's interest in profits each insurance might apparently be for the full value of the timber. The absurdity, as it appears to me, of such a contention is only emphasised when it is remembered that quite irrespective of the shareholders it would also be competent for the company to insure the timber in its full value, and yet a fire insurance like a marine insurance is only a contract of indemnity. *Castellain* v. *Preston* (1).

The question then to be determined, in my opinion, is whether Macaura, whom I am prepared to regard as practically a universal shareholder had such a direct interest in or connection with the timber insured as constituted an insurable interest? He was clearly not the legal or equitable owner of the property, which belonged to a wholly distinct legal entity—the Canadian Company. Was there then any contract between Macaura and the Company which created in him the necessary direct interest in the property insured? There is none. During the argument it was at one time no doubt suggested by Serjeant Sullivan that an implied contract of bailment existed, as the timber was at the time of the fire, and, indeed, from the time it had been cut, on Macaura's lands, and that he alone exercised any dominion or control over it. But I hope I am doing no injustice to Serjeant Sullivan's argument when I say that this contention was abandoned when I called his attention to the exception contained in condition 3 of the policy of "Goods held in trust or on commission"—an expression which has been frequently judicially interpreted as including all goods which are in the possession of the insured as bailee quite irrespective of the nature of the contract by which they come into his possession. We have been referred to two very important cases upon the question of a shareholder's right to insure the property of the Company. I make no apology for dealing with them at some length, for properly understood they appear to me practically to determine this case. The first of these cases is *Paterson* v. *Harris* (2). A shareholder owning one £1,000 share in the Atlantic Telegraph Company,

(1) 11 Q.B.D. at p 397.
(2) 1 B. & S. 336 and 2 B & S. 814.

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established for the purpose of laying down a submarine cable between the United Kingdom and America, effected an insurance nominally upon the ship goods and merchandizes with the added words, "the said ship goods and merchandizes for "so much as concerns the assured agreement between the assured and assurers in this policy are and shall be valued at one £1,000 share in The Atlantic Telegraph Company—said share valued at £1,100." The insurance was held good. It is important, however, to note the grounds of the decision. Counsel on the one side contended and the other side admitted that the policy was not on the cable, but on the plaintiff's share in the Atlantic Telegraph Company. Cockburn C.J. adopts this view in the opening sentence of his judgment, ultimately stating that on the true construction of the policy the underwriters contracted to indemnify the owner of that share against any losses arising to his interest in the cable, which interest was by agreement valued £1,100.

The second case is *Wilson* v. *Jones* (1). It is similar to the last case both in law and fact. It is also related to an insurance connected with the laying of an Atlantic Cable some five years later. The insurance was effected on a common printed form of a marine policy upon goods and merchandizes in the "Great Eastern," the said ship goods and merchandizes *for so much as concerns the assured* by agreement between the assured and assurers being valued at £200 on the Atlantic Cable value say on twenty shares valued at £10 per share. A marginal note stated that the policy, in addition to perils and casualties specified should cover every risk and contingency attending the conveyance and successful laying of the cable. Martin B., in delivering the judgment of the Court of Exchequer, held that on its true construction, due effect being given to the marginal note, the policy was not merely on the cable, but on the adventure. That is, as I understand it, the insurance was not merely on the cable in which the plaintiff as a shareholder had no direct interest, it was also in the adventure, in the profits of which as a shareholder he had a direct interest. This judgment was

(1) L.R. 1 Ex. 193 and L.R. 2 Ex. 139

affirmed in the Exchequer Chamber. The report of the hearing in this Court, contained in the Law Reports (1), leaves no doubt as to the decision or the ground on which it was based. Thus Willes J. (at pp. 144-5) says :—

" Without referring further to authority or reasoning over again what has been decided by the highest authority it may be stated (as it has been asserted in argument) that the plaintiff had in respect of his shares no direct interest in the cable. As a shareholder he had an interest in the profits to be made by the concern, but he had none in the property of the concern itself."

Proceeding then to consider what was the subject matter insured, he says :—

" In one sense, indeed, it is an insurance on the cable, that is it affects the cable as an insurance on freight affects the ship. . . . But, except in that sense, it will appear when the language of the policy is examined that the insurance is an insurance not on the cable but on the interest which the plaintiff had in the success of the adventure." Referring to the valuation clause of the policy he says that "These words, which qualify the previous words, are themselves followed by a context plainly shewing that the thing insured was the value of the plaintiff's shares or rather his interest in the profits to be derived from his shares when the cable should be laid." Being therefore of opinion that on its true construction the subject matter of the policy was not the cable, in which the plaintiff had no direct interest, but rather his interest in the profits, which was obviously a direct and immediate one based both on statutory and contractual rights he held that the plaintiff had an insurable interest, and that the policy was not, as the defendant contended, a mere wager.

Serjeant Sullivan has, however, directed our attention to the report of the proceedings in the Exchequer Chamber contained in the Law Journal (2) where Willes J. is reported in a bracketed sentence to have said :—

" It may be that although he (the plaintiff) had no direct interest in the cable he might still have had an interest to satisfy the statute, but I give no opinion upon

(1) L.R. 2 Ex. 139 (2) 36 L.J. Ex 78 at p. 80.

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that, I only observe on the point in passing lest it should be supposed that the court overlooked it."

I cannot read these words, which would be at most the expression of a doubt in the plaintiff's favour. Rather do they appear to me to be against him by reason of their obviously deliberate deletion from the official judgment revised by the learned Judge for the report of the case contained in L.R. 2 Ex. 139. These two cases of *Paterson* v. *Harris* (1) and *Wilson* v. *Jones* (2), therefore, entirely bear out in my opinion the conclusion of law expressed in McGillivray on Insurance Law at p. 124 in the passage so strenuously attacked and ridiculed by cousel for the plaintiffs.

The view that a shareholder has no direct interest in the assets of the company has been expressed and acted upon in many other cases. In *Myers* v. *Perigal* (3) it was held that the shares in a joint stock bank the property of which consisted in part of freehold and copyhold estates and mortgages for terms of years were not within the Statute of Mortmain 9 Geo. II., c. 36, obviously on the ground advanced in argument that as a shareholder, unlike a mortgagee, has no direct interest in the land the shares were not an " estate or interest in land " or a " charge or incumbrance affecting lands " within the meaning of the statute. Lord Langdale in *Sparling* v. *Parker* (4) makes the position of a shareholder clear:— " A shareholder," he says, " in one of these companies " (he was speaking of gas, light and dock companies) " whether incorporated or not has a right to receive the dividends payable on his share, *i.e.*, a right to his just proportion of the profits arising from the employment of the joint stock consisting partly of land, and he has also a right to assign his shares for value, but whilst he continues to hold his shares he has no interest or separate right to the land or any part of it." For all these reasons I am of opinion that whilst plaintiff had an insurable interest in the profits of this company, whose sole

(1) B. & S. 336 & 2 B. & S. 814.
(2) L.R. 1 Ex. 193 & L.R. 2 Ex. 139.
(3) 11 C.B. Rep. 90.
(4) 9 Beav. 450 at p 457.

assets were apparently the timber, he had yet no insurable interest in the timber itself, which, as I have already pointed out, he dealt with in the policy as if it was his own property.

It may be suggested that this is quite a technical point. For my own part I do not admit that it is purely technical nor do I agree that on that ground it must be disregarded. A perusal of the judgments of Blackburn J. in *Wilson* v. Jones (1) and of Lord Denman C.J. in *M'Swiney* v. *Corporation of Royal Exchange Assurance* (2) makes abundantly clear the necessity for the use of strictly proper words in describing the nature of the interest insured.

Another reason why, in my opinion, it was of vital importance that the precise nature of the plaintiff's interest should have been specified in the policy is that this case falls, in my opinion, as contended by Mr. Brown, within the rule that where the peculiar nature of the interest is such that the risk may be affected thereby, and where it may be said that such interest is itself the subject matter of the insurance the nature of the interest must be clearly specified. *Mackenzie* v. *Whitworth* (3) So much for his interest as shareholder. It is, however, further argued that Macaura had a sufficient insurable interest in the timber as creditor of the Company. The proposition is quite unsustainable. A creditor for an ordinary debt which is not in any way secured by a lien or charge of any kind upon specific property cannot in my opinion insure his debtor's property, for his right is against the debtor personally and not against his property.

The only case in which, so far as I am aware, that principle has been in any way departed from or extended is *Moran Galloway & Company* v. *Uzielli* (4); but the Court only held that the plaintiffs had an insurable interest in that case, because under section 6 of the Admiralty Court Act, 1840 (5) they had a right to enforce their claim for advances so far as they were in respect of necessaries supplied to the ship by an action in rem, and for that purpose to arrest the ship. In other words, they had what I may call an equitable statutory lien against specific assets of their debtors.

(1) L.R. 2 Ex. at page 151. (3) L R. 1 Ex. D. 36.
(2) 14 Q.B. at page 645. (4) [1905] 2 K.B. 555
(5) 3 & 4 Vict. c. 65

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Being therefore clearly of opinion that the plaintiff Macaura had not any insurable interest in the timber which formed the subject matter of the insurance as distinguished from an interest in the profits to be derived therefrom, I proceed to consider whether the arbitrator was justified in giving effect to this view or whether we set aside his award on the ground that he had no authority or jurisdiction to entertain or determine it or on any of the grounds specified in the notices of motion.

In my opinion the arbitrator had full jurisdiction to determine the question of the insurable interest. The plaintiff's contention is that he had no authority to enter upon inquiry other than in reference to the dispute referred to in the order dated 21st July, 1922. That order provides that all proceedings in the action be stayed, and that " the matter in dispute " be referred to arbitration. What " the matter " may be is not stated, and it may be reasonably contended under the circumstances that it was the wide question of the defendant's liability. It is endeavoured, however, to give it a more limited interpretation by referring to the affidavits on which the order was grounded and to the correspondence exhibited therein, particularly the letter of the defendant's fire assessors, Messrs. Montgomery & Son, of 30th May, 1922. In that letter it is quite true to say that the writers state that they had ascertained all the circumstances connected with the fire, and that they declined to accept liabilty for the loss of any timber situate within one hundred yards of the saw mill. The same point is relied upon by the defendants' solicitors, Messrs. Hoey & Denning, in their letter of 12th June, but I am not prepared to bind the defendants by the terms of these letters when construing the order of 21st July. If it was intended by the Court or by the parties to limit the arbitrator's jurisdiction to a single narrow issue this should have been specified in the order. Further, I heard no answer to Mr. Brown's argument for the defendants that this arbitration was not held under a compulsory reference, but under the submission of the parties, who, by Clause 13 of the policy, agreed that " every such difference " (including a difference as to liability or the amount or extent of the liability) should be referred to arbitration. The duty of the Court in

such circumstances is, it appears to me, to refer all or, if for sufficient reason it thinks right, none of the matters in difference to arbitration, and I accordingly construe the somewhat ambiguous words of the order of 21 July in their widest possible sense as intending to refer the action or proceedings, with all issues properly raisable therein, to the arbitrator.

The last consideration to which I wish to refer is that, in my opinion, having regard to the course of proceedings before the arbitrator, the defendants should not now be allowed to contend that the arbitrator had no jurisdiction to determine this question of insurable interest. The point was explicitly raised by Serjeant Hanna in his opening speech for the defence, and when at the close of the speech Mr. Brown suggested that this point, together with the question of the construction of the policy on which no evidence would be required, might be dealt with at once, Serjeant Sullivan only answered that he would deal with it in his reply. In that reply Serjeant Sullivan argued fully the question of insurable interest, and asked the arbitrator if he had any doubt on the point to state a case upon it, a request reiterated through the mouth of Mr. Brown in the concluding words of the proceedings. The case was stated. We are even told it was stated after conference between the arbitrator and counsel for both parties. In my opinion it would be nothing short of a travesty of justice in such circumstances to set aside the award on the ground that the arbitrator had no jurisdiction to entertain or determine the issue. If Serjeant Sullivan considered, during the arbitration proceedings, that the arbitrator was acting in excess of his powers or under a more extended jurisdiction than was conferred upon him by the submission and order his proper course was, in my opinion to obtain an adjournment of the arbitration and apply to the Court under the proviso to section 14 of the Common Law Procedure Act (Ireland), 1856, that the order of 21st July should be discharged, and that the action should be allowed to proceed. He did not apply for such adjournment. In my opinion he took his chance of obtaining a decision in his favour

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from the arbitrator, and on the principle underlying the judgment of the Court of Appeal in the recent case of *Isaacs* v. *Hobhouse* (1) he cannot now be heard to allege that the arbitrator had no jurisdiction to determine the matter.

I wish to add that I am clearly of opinion that the building which had been used as a saw mill prior to August, 1921, was not at the time of the loss a saw mill within the meaning of these words in the policy. I have no doubt both from the nature of the policy and from the acceptance by the insurance companies of a non-risk premium though the timber had to their knowledge been brought within 100 yards of the building in question, that both parties regarded the term " saw mill " in the policy as premises which were either being actively used as a saw mill or were so equipped as to be capable of being used as such at any moment. The defendant's argument in effect is " once a saw mill always a saw mill." This view is quite unsustainable. In my opinion once these premises were dismantled they ceased to be a " saw mill " within the meaning of the policy.

On the other points raised in argument my opinion so entirely coincides with the views expressed by the Lord Chief Justice and Lord Justice Moore that it is unnecessary for me to say anything further.

In my opinion, both questions submitted to us by the arbitrator should be answered in the negative, and the appeal dismissed with costs.

Solicitor for the plaintiff : *E. J. Malone.*
Solicitors for the defendants : *Hoey and Denning.*

J. McC.

(1) [1919] I.K.B. 398

The Judgment of the Court of Appeal was affirmed by the House of Lords 3 April, 1925 (see [1925] C.A. p

[IN THE COURT OF APPEAL].

K. B. D.
1925

AYLMER
v
MAHAFFEY
March 3

Appeal
1925
April 30
May 1
May 11

G. M. AYLMER (Surveyor of Taxes), Appellant;

W. J. MAHAFFEY, Respondent (1).

Revenue—Income Tax—Assessment—Deduction—Guarantee of Customer's Loan—"Money wholly and exclusively paid out for the purposes of the trade"—Res judicata—Income Tax Act, 1918 (8 & 9 Geo., 5 c. 40) Schedule D, 3 (a) Cases I. & II. and s. 196.

The respondent, a commission agent, was promised large orders by one of his customers if he would guarantee up to £1,000 the customer's loan from his bankers. The respondent did guarantee the loan, the customer failed, and the respondent was obliged to pay the sum of £1,000 to the bank under his guarantee.

The respondent claimed to deduct this sum of £1,000 in computing the profits for the year ending 31st March, 1921, as "money wholly and exclusively laid out or expended for the purposes of the trade." The Commissioners for the Special Purposes of the Income Tax Acts on an appeal from an assessment decided that the £1,000 was not a proper deduction. The respondent appealed to the Recorder of Belfast, who reversed this decision and allowed the respondent the deduction claimed. The question came again before the Special Commissioners by way of an appeal from an assessment for 1922-23. The Special Commissioners who heard the appeal held that the Recorder's decision on the 1921-22 appeal did not prevent the question from being raised in connexion with the appeal against the assessment for 1922-23, and while ruling that the £1,000 was not an allowable deduction in deference to the decision of the Recorder regarding the previous assessment they allowed the deduction claimed, and reduced the assessment accordingly.

Held by the King's Bench Division (Sir Denis Henry, Bart. C.J. and Brown J.) that the matter should be remitted for determination to the Commissioners for the Special Purposes of the Income Tax Acts, pursuant to their findings, and

Held by the Court of Appeal discharging the order of the King's Bench Division, that the case must go back to the Commissioners with a declaration that the question submitted by them was res judicata and that the respondent's assessment for the year 1922-23 should be amended accordingly.

CASE STATED by the Commissioners for the special purposes of the Income Tax Acts, as follows:—

At a meeting of the Commissioners for the special purposes of the Income Tax Acts held on 23rd November, 1922, at Belfast, for the purpose of hearing Appeals, W.

(1) Before Moore and Andrews, L.JJ.

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J. Mahaffey (hereinafter called the respondent) appealed against an assessment to Income Tax (Schedule D.) in the sum of £458 for the year ending 5th April, 1923, made upon him under the provisions of the Income Tax Acts in respect of his profits as a manufacturer's agent.

The assessment of £458 was computed on an average of 3 years as follows:

Year to 31st March 1920 profit	... £916
,, 1921 ,,	... 618
,, 1922 Loss	... 158
	3)1376
Average	£458 as assessed

The only point for the decision of the Court is whether a sum of £1,000 paid by the respondent in the year to 31st March, 1921, in the circumstances set out below is a proper deduction in computing the profits of that year. If that £1,000 is proper deduction the liability is agreed to be £125 arrived at as follows:—

Year to 31st March 1920 profit	... £916
,, 1921 Loss	... 382
,, 1922 Loss	... 158
	3)376
Average	£125

If, on the other hand, the £1,000 is not a proper deduction it is agreed that the assessment of £458 is correct.

The respondent is an agent seeking orders for his principals and paid by Commission. One of his customers promised him large orders if he would guarantee up to a maximum of £1,000 the customer's loan from his bankers. The respondent gave this security, the customer failed, and the respondent was obliged to pay the sum of £1,000 to the Bank under his guarantee in the year ended 31st March, 1921. He stated that his sales to this customer did increase considerably for several months after he gave the guarantee, but there was no written agreement which bound the customer in any way to use his bank loan

solely or mainly to purchase goods from the respondent.

It was contended on behalf of the respondent that this payment of £1,000 was a proper deduction from his profits as an agent for the year ended 31st March, 1921, that it was "money wholly and exclusively laid out or expended for the purposes of the trade &c." within the terms of Rule 3 of the Rules applicable to Cases I. and II. of Schedule D., and that the assessment for the year 1922-23 should therefore be reduced from £458 to £125. The following cases were cited in support of these contentions—*Moore* v. *Stewart & Lloyds* (1), *Guest, Keen & Nettlefolds* v. *Fowler* (2), *Reid's Brewery Company* v. *Male* (3), *Stevens* v. *Durban-Roodeport Gold Mining Co., Ltd.* (4).

The Inspector of Taxes cited the cases of the *English Crown Spelter Co. Ltd.* v. *Baker* (5), and *Stott* v. *Hoddinott* (6), and contended that the payment of £1,000 under the guarantee given to the Bank was not an expense incurred by the respondent in earning his profits as an agent.

The point which is the subject of this case was raised by the respondent in an appeal to the Special Commissioners against the assessment made upon him for the year 1921-22, and the Special Commissioners who heard the appeal for that year decided that the £1,000 was not a proper deduction. The appeal against the assessment for 1921-22 was then re-heard by the Recorder of Belfast, under the provisions of Section 196 of the Income Tax Act, 1918; the Recorder reversed the decision of the Special Commissioners and allowed the respondent the deduction he claimed. At the hearing of the appeal against the assessment for 1922-23—to which year alone the present case relates—it was argued for the respondent that by the Recorder's decision given in connection with the 1921-22 assessment the sum of £1,000 in question was allowed as a deduction from the profits of the year ended 31st March, 1921, with the result that the trading for that year showed a loss of £382, and that it was not competent for the Inspector of Taxes in making the assessment for a subsequent year to bring into average in respect of the year to 31st March, 1921, an alleged profit

(1) 6 Tax Cases 501. (3) 3 Tax Cases 279 (5) 5 Tax Cases 324
(2) 5 Tax Cases 511 (4) 5 Tax Cases 402 (6) 7 Tax Cases 85

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of £618 or any figure other than a loss of £382. The Inspector of Taxes contended that the Crown was entitled to raise the question of the admissibility of the said sum of £1,000 as a deduction upon the assessment for the year ended 5th April, 1923, and for that purpose to disallow the said sum of £1,000 in computing the amount of the said assessment.

The Special Commissioners who heard the appeal held that the Recorder's decision on the re-hearing of the 1921-22 appeal did not prevent the question from being raised in connection with the appeal against the assessment for 1922-23. They agreed with their colleagues who had heard the 1921-22 appeal that the £1,000 was not an allowable deduction, but in deference to the decision of the Recorder for 1921-22 they allowed the deduction claimed and reduced the 1922-23 assessment from £458 to £125.

The appellant immediately upon the determination of the appeal declared to the Special Commissioners his dissatisfaction therewith as being erroneous in point of law and in due course required them to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149.

March 3

SIR DENIS HENRY, *C.J.*, delivering judgment of the King's Bench Division (1) said:—This was a case stated under the Income Tax Act, 1918, Sec. 149, by the Commissioners for the special purposes of the Income Tax Acts. The only point for decision is stated to be whether a sum of £1,000 paid by the respondent in the year to 31st March, 1921, in the circumstances set out in the case is an allowable deduction. If so, the liability is agreed to be £125; if not, £458 as assessed.

The respondent is an agent seeking orders for his principals and paid by commission. One of his customers promised him large orders if he would guarantee up to a maximum of £1,000 the customer's loan from his bankers. The respondent gave this security, the customer failed, and the respondent was obliged to pay the sum of

(1) In the King's Bench Division before Sir Denis Henry, Bart., C.J., and Brown, J.

£1,000 to the Bank under his guarantee in the year ended 31st March, 1921. He stated that his sales to this customer did increase considerably for several months after he gave the guarantee, but there was no written agreement which bound the customer in any way to use his bank loan solely or mainly to purchase goods from the respondent. It was contended on behalf of the respondent that this payment of £1,000 was a proper deduction from his profits as an agent for the year ended 31st March, 1921, that it was "money wholly and exclusively laid out or expended for the purposes of the trade, &c." within the terms of Rule 3 of the Rules applicable to Cases I. and II. of Schedule D., and that the assessment for the year 1922 23 should therefore be reduced from £458 to £125. The following cases were cited in support of these contentions:—*Moore* v. *Stewart & Lloyds* (1), *Guest, Keen & Nettlefolds* v. *Fowler* (2), *Reid's Brewery Company* v. *Male* (3), and *Stevens* v. *Durban-Roodeport Gold Mining Company, Ltd.* (4).

The Inspector of Taxes cited the cases of the *English Crown Spelter Co., Ltd.*, v. *Baker* (5) and *Stott* v. *Hoddinott* (6), and contended that the payment of £1,000 under the guarantee given to the Bank was not an expense incurred by the respondent in earning his profits as an agent.

The point which is the subject of this case was raised by the respondent in an appeal to the Special Commissioners against the assessment made upon him for the year 1921-22, and the Special Commissioners who heard the appeal for that year decided that the £1,000 was not a proper deduction. The appeal against the assessment for 1921-22 was then re-heard by the Recorder of Belfast, under the provisions of Section 196 of the Income Tax Act, 1918; the Recorder reversed the decision of the Special Commissioners and allowed the respondent the deduction he claimed. At the hearing of the appeal against the assessment for 1922-23—to which year alone the present case relates—it was argued for the respondent that by the Recorder's decision given in connection with the 1921-22 assessment the sum of £1,000 in question was allowed as a deduction from the profits of the year ended 31st March, 1921, with the result that the trading for that year showed

(1) 6 Tax Cases 501
(2) 5 Tax Cases 511
(3) 3 Tax Cases 279
(4) 5 Tax Cases 402
(5) 5 Tax Cases 324
(6) 7 Tax Cases 85

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a loss of £382, and that it was not competent for the Inspector of Taxes in making the assessment for a subsequent year to bring into average in respect of the year to 31st March, 1921, an alleged profit of £618 or any figure other than a loss of £382. The Inspector of Taxes contended that the Crown was entitled to raise the question of the admissibility of the said sum of £1,000 as a deduction upon the assessment for the year ended 5th April, 1923, and for that purpose to disallow the said sum of £1,000 in computing the amount of the said assessment.

The Special Commissioners who heard the appeal held that the Recorder's decision on the re-hearing of the 1921-22 appeal did not prevent the question from being raised in connection with the appeal against the assessment for 1922-23, and agreed with their colleagues who had heard the 1921-22 appeal that the £1,000 was not an allowable deduction, but in deference to the decision of the Recorder for 1921-22, allowed the deduction claimed and reduced the 1922-23 assessment from £458 to £125.

Under Sec. 196 of the Income Tax Act of 1918 any person who is aggrieved by the determination of the Special Commissioners may require that his appeal shall be heard by the Recorder or County Court Judge whose determination is final. This Section only applies to Ireland and is a remedy provided in addition to Sec. 149, and is a speedy means of having a decision which will be final.

The course pursued here deprives the respondent of what may be a valuable right, as Sec. 196 gives an appeal on a question of fact as well as law, and, as the Special Commissioners have held that the Recorder's decision on the re-hearing of the 1921-22 appeal did not prevent the question being now raised and that the £1,000 was not an allowable deduction, they should have disallowed the deduction. It is stated in the case stated that in deference to the opinion of the Recorder for 1921-22 they allowed the deduction.

This course obviously follows *Matthews* v. *County Council of Cork* (1). The question was not raised in that case by the counsel for the County Council nor was it pointed out by anyone that any right of appeal was affected.

(1) [1910], 2 I. R. 521.

We remit the matter for determination to the Commissioners for the special purposes of the Income Tax Acts pursuant to their findings with costs to be paid to the respondent by the Inland Revenue.

The appellant appealed to the Court of Appeal of Northern Ireland (1).

The Attorney-General for Northern Ireland (*Richard Best, K.C.*), and *J. C. Davison* for the appellant:—

We submit that the Recorder's decision constitutes no legal estoppel and that the judges in the King's Bench Division have not answered the question that was put to them. We contend that the sum of £1,000 was either capital expenditure or a loan and does not come within the words of Schedule D. We rely on the judgment of the Lord President in *Vallombrosa Rubber Co., Ltd.*, v. *Farmer* (*Surveyor of Taxes*) (2), where he says at p. 536, "Now, I don't say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year." We also rely on *The City of London Contract Corporation, Ltd.*, v. *Styles* (*Surveyor of Taxes*) (3), and especially on the judgment of Lord Esher, M.R., at p. 244, and on *English Crown Spelter Co., Ltd.*, v. *Baker* (4). *Stott* v. *Hoddinott* (5), very closely resembles the present case. The principle which is applicable is stated by Earl Loreburn, L.C., in *Strong & Co., Ltd.*, v. *Woodifield* (6), where he says at p. 452, "In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade it-

(1) Before Moore and Andrews, L.JJ.
(2) 5 Tax Cases 529.
(3) 7 Tax Cases 239
(4) 99 L.T.R. 353.
(5) 7 Tax Cases 85
(6) [1906] A.C. 448

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self." *Guest, Keen & Nettlefolds, Ltd.*, v. *Fowler* (1) is not really against our contention as in that case there was an agreement in writing. No evidence was given by the respondent to prove that this money was used by him in his business. We submit that the procedure adopted by the Special Commissioners was quite right as appears from *Mathews* v. *The Cork County Council* (2), and *Humphrey* v. *Peare* (3). *Smith* v. *Lion Brewery Co., Ltd.* (4), is really in our favour. *Reid's Brewery Co.* v. *Male* (5) is a much stronger case than the present. Here the customer might repay the money with interest to the respondent. This case is very important to the Revenue authorities, as it might easily lead to fraud. We submit that this is not an allowable deduction. The Commissioners have set out all the material facts in the case stated. *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (6) is quite different from the present case. We submit that the facts have been properly and sufficiently set out, and that the inference to be drawn from those facts is one of law. All that was made final and conclusive was the actual assessment for 1921-22, in so far as the doctrine of Res Judicata applies. *Commissioners of Inland Revenue* v. *Brooks* (7), *Singer* v. *Williams* (8), *Bradbury* v. *English Sewing Cotton Co.* (9).

E. S. Murphy, K.C., and *Hume* for the respondent:—

The question the Court is now asked to determine is entirely one of fact. The Special Commissioners adopted an entirely different procedure at the 1922-23 appeal from that which they had taken in the previous year. The only question to be decided is, was this deduction a proper one or not? We were entitled to have that question settled by the Special Commissioners. We submit that the Special Commissioners have perpetrated a very gross injustice on the subject. The respondent should have had his appeal to the Recorder on the second occasion, just as he had it in regard to the first assessment. *Smith* v. *Incorporated*

(1) [1910] 1 K.B. 713. (4) [1911] A.C. 150. (7) [1915] A.C. 478.
(2) [1910] 2 I.R. 521. (5) [1891] 2 Q.B.1. (8) [1921] 1 A.C. 41.
(3) [1913] 2 I.R. 462. (6) [1914] 3 K.B. 674. (9) [1923] A.C. 744.

Council of Law Reporting for England and Wales (1) is a clear and conclusive authority that the matter to be decided here is a question of fact for the Special Commissioners. To the same effect is the judgment of Lord Johnston in *Grahamston Iron Co.* v. *Crawford* (2) at p. 29. *Currie* v. *Commissioners of Inland Revenue* (3), and *Great Western Ry. Co.* v. *Bater* (4) are also authorities in our favour. The Special Commissioners holding the opinion they expressed should not have discharged the assessment. It is for them to determine the question of fact. It is a legal hardship on the respondent, if having two remedies, he is deprived of one. None of the cases cited on behalf of the appellant as to what constitutes an allowable deduction are precisely applicable. Investments of capital differ completely from the present case, where there was no such investment at any stage. This distinguishes the present case from *Stott* v. *Hoddinott* (5). We rely on *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (6), which we submit is strongly in our favour. To re-open the Recorder's decision would amount to treating his determination as being neither final nor conclusive.

Moore v. *Stewarts & Lloyds, Ltd.* (7) is very close to the present case. We contend that this is a case of Res Judicata, and that it is quite different from *Edwards* v. *The Old Bushmills Distillery Co., Ltd.* (8), where the facts in each year were different. We submit that the principles laid down by Lord Parker of Waddington in *Inland Revenue Commissioners* v. *Brooks* (9) apply to the present case. We contend strongly that the decision of the King's Bench Division was right in so far as it referred the question back to the Special Commissioners for decision. The guarantee was given not for philanthropy, but for the purposes of business. The Crown are not entitled in effect to appeal from the decision of the Recorder, where there is nothing new. It was only on account of his business and in order to secure the orders that were promised him that the respondent guaranteed the £1,000. We submit that the appeal ought to be dismissed.

[*Cur. adv. vult.*

(1) [1914] 3 K B 674.
(2) 7 Tax Cases 25.
(3) [1921] 2 K.B. 332.
(4) [1922] 2 A C. 1.
(5) 7 Tax Cases 85.
(6) [1915] A.C. 433.
(7) 6 Tax Cases 501.
(8) Unreported.
(9) [1915] A.C. 478.

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Appeal

MOORE, L.J. : This comes before us on appeal from an Order of the King's Bench Division made on a case stated under section 149 of the Income Tax Act, 1918, by the Special Commissioners at the request of the appellant, Mr. Aylmer, who is H.M. Inspector of Taxes.

The facts can be very shortly set out [the Lord Justice quoted, paragraph 3 of the case stated, and proceeded] :—

The effect of this transaction on the profit and loss account of the respondent for the year ending March, 1921, was to convert a profit of £618 into a loss of £382, but of course this is without prejudice to the question how far such a loss is deductible from annual gains for the purpose of the Income Tax Act, 1918. The respondent has consistently contended that such deduction is proper.

At the end of the financial year 1921-22, namely, in April, 1922, the Special Commissioners decided against the respondent's contention and held that the loss of £1,000 was not the subject of proper deduction, inasmuch as under Schedule D. 3 it was not "money wholly and exclusively laid out or expended for the purposes of (his) trade." The respondent being dissatisfied with this determination thereupon exercised his right of unrestricted appeal to the Recorder of Belfast, before whom both parties appeared, and on May 19th, 1922, the Recorder gave his decision in writing as follows—"I have considered the facts and arguments presented in this case and in my opinion the deduction of £1,000 claimed is a proper one and should be allowed, on the ground that the payment of this sum was made in pursuance of an agreement which the appellant entered into for the purpose of his business and with a view to earning profits, and should be considered as having been made wholly and exclusively for the purpose of appellant's trade as a commission agent."

The Commissioners then accepted, as they were bound to do, this decision, and the respondent was thereupon assessed for the year 1921-22 upon the average of that year with the two preceding years, on the basis that the year 1921-22 showed a loss of £382.

In computing the liability of the respondent for the following year 1922-23, which is arrived at under the rule

applicable to Case II., Schedule D., upon "a fair and just average of 3 years" ending on April 5th, 1923, the appellant, as he was bound to do, brought the year 1921-22 into average, but as I think he was not bound to do, he ignored the decision of the learned Recorder, and set out the profits for 1921-22 at £618—although the Recorder had already declared that the £1,000 was a proper deduction—instead of as showing a loss of £382.

The present appeal is an attempt by the appellant to obtain from us by way of case stated a decision which will declare whether or not, on a question of mixed law and fact, the Recorder was right or wrong in his decision. The Special Commissioners set this question out in para. 2 of the case stated—"The only point for the decision of the Court is whether a sum of £1,000 paid by the respondent in the year to 31st March, 1921, in the circumstances set out below, is a proper deduction in computing the profits of that year."

The Commissioners (para. 7) who heard the appeal of the respondent against the inclusion of the year 1921-22 at the figure of £618 were of opinion that the question could be raised again in the assessment for 1922-23, that the deduction was not a proper one, but in deference to the Recorder's decision they reduced the assessment as contended for by the respondent.

This result, strange as it may appear at first sight, is not satisfactory to the respondent. He is obviously not a wealthy man, judging from his returns, and he would much have preferred to have had a determination against himself, in which case he would once more have appealed to the Recorder both on law and fact; there is every probability that the Recorder would have repeated his previous decision, and there would have been an end to the matter.

On the other hand it is natural that the appellant does not desire any further appeal to the Recorder, and he prefers to appeal by way of case stated under section 149, 2a to the High Court, but the High Court can only decide questions of law. The appellant, if adverse decisions are given against him, can carry his appeal to the House of Lords, and though this may mean much practical inconvenience to the respondent and little to the appellant, yet

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I cannot see that it constitutes any legal hardship. We have therefore had a wealth of argument from opposing counsel on the question, whether the question stated by the Commissioners is one merely of law within our jurisdiction as such, or, as contended by Mr. Murphy, one of fact only.

The Lord Chief Justice in the Court below considered that the action of the Special Commissioners in determining in the respondent's favour while they held a contrary opinion themselves, deprived the respondent of a legal right to appeal and remitted the case, as I understand it, to the Commissioners, directing them in effect to come to a determination in accordance with their findings of fact; but I think that the real hardship in this lies in the knowledge that both parties presuppose a decision of the Recorder in respondent's favour, which is after all only what I may term a legal accident.

Now as I have said the question stated for us by the Commissioners is:—"Whether a sum of £1,000 paid by the respondent in the year to 31st March, 1921, in the circumstances set out, is a proper deduction in computing the profits of that year?"

But in my judgment there is a prior question to be decided, and that is, whether the Commissioners have power to raise this question at all for our consideration, and whether we have power to decide it? If the matter has once been concluded between the appellant and respondent as a res judicata, can it be raised again by either of the parties? In my opinion it cannot. Res judicata presupposes that there are two opposing parties, that there is a definite issue between them, that there is a tribunal competent to decide the issue, and that within its competence the tribunal has done so. The law on this subject, if I may respectfully say so, is admirably set out in the speech of Lord Shaw of Dumferline in *Bradshaw* v. *M'Mullan* (1) at p. 423, to which I shall presently refer.

Taking the various elements I have named in their order, as applicable to the evidence in the present case, what do we find? (a) That there was an applicant before the Special Commissioners in 1922, the present respondent,

(1) [1920] 2 I.R. 412.

and *a legitimus contradictor*—the present appellant (b) That the present respondent was rightfully an appellant and the present appellant rightfully a respondent before the learned Recorder in May, 1922. (c) That the issue between them was definitely raised and rightfully raised at that appeal and it was (quoting from the judgment of the Recorder) whether the payment of the said sum of £1,000 was a proper deduction and should be allowed? (d) That under sec. 196 applicable to Ireland the Recorder had all the jurisdiction "in relation to the assessment appealed against the determination and all matters consequent thereon as the Special Commissioners might have and exercise, and his determination thereon shall be final and conclusive."

I have already referred to the decision given by the Recorder, and in my opinion it is a declaration validly made between the parties that the respondent's assessment for the year 1921-22 is to be taken at a loss of £382. There was no power to appeal from this, and I consider the appellant is so far bound by it that he is now precluded from raising the same issue again in any other proceedings as against the respondent. As Lord Shaw in effect observes: The merits of the identical dispute betwen the identical parties on the identical subject matter on the same media have been settled by judgment. The judicial mind has been applied to it.

In this connexion it is perhaps material to point out, that the Special Commissioners only heard the evidence once, and that in 1922. When the appeal came before them in 1923 they never took fresh evidence, but went back to that already given in 1922. I do not say they were wrong in this on the facts of the present case. They apparently were not asked to do so by the respondent, and, naturally enough, because both parties recognised that the transaction out of which all this litigation has arisen was an isolated and single one, from its very nature non-recurrent. But this very fact makes the application of the principle of res judicata all the more clear.

Mr. Davison referred us as an authority in his favour to *Commissioners of Inland Revenue* v. *Brooks* (1).

(1) [1915] A.C. 478.

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I think this is clearly an authority against him. There the appellant had made against him by the General Purposes Commissioners of Income Tax an assessment of £6,331, and this became a final assessment. When the Super Tax Commissioners—I use a popular phrase—proceeded to assess him for super-tax, the Crown relied on the previous assessment, accepting it as final. The House of Lords decided that the previous assessment did not bind the Super Tax Commissioners, and therefore could not bind the appellant. This is my own summary of the decision. It is plain from the judgments of their Lordships that if the Commissioners who made the final assessment had also been charged with the duty of assessment for super-tax, the assessment already made would have been binding. But the Lord Chancellor, Earl Loreburn, says, p. 483: "It (the Act) does not say that the determination is to be final for all purposes. When therefore, another tax is imposed by another statute, whether it be a duty of income tax or not, and a different tribunal is directed to estimate the same figure as part of a greater whole, I do not read the section as imposing upon the new tribunal a duty to accept the determination of the old."

In the present case the Commissioners say that they followed the decision of the learned Recorder out of deference. With all respect to the Commissioners I cannot but think that there is somewhat of lip service in this declaration. They have given the practical go-bye to the Recorder's decision in the case they have stated. They have set out the facts on which it was based, and the learned Attorney-General has pressed us to decide upon them de novo, as if the decision had never been given, and the Commissioners have themselves expressed the view that it is erroneous. I think if they wished to defer to the Recorder they should have asked us how far they were bound to follow his judgment?

The Attorney-General has referred us to two authorities justifying their action in so deferring—*Matthews* v. *County Council of Cork* (1), and *Humphrey* v. *Peare* (2), and in each of these cases the same distinguished judge—Palles, C.B.—commended the Commissioners for following what

they understood was the earlier decision in the first case of the Recorder of Cork, and in the second of the County Court Judge of Tipperary in cases not between the same parties, but in similar cases. I think that as a matter of propriety this is quite right. The Recorder or County Court Judge is the appellate authority on questions of law and fact. But it rests with the Commissioners to decide for themselves before following the tribunal how far its decision is based on fact or on law. If based on fact, they must decide that the facts are identical before they can follow it. If on the other hand the decision is based on law as distinguished from fact, I think it right that they should accept the law so declared, until reversed by a higher authority. But I have no doubt that in the same case on the same facts between the same parties, it should be followed not out of respect, but out of duty. In *Edwards* v. *The Old Bushmills Distillery Co.* (3), which recently came before this Court, the Commissioners considered that they were bound by the decision of the Recorder on one state of facts in the preceding year to apply that decision to what was necessarily a different state of facts in the following year, though I do not say that it necessarily follows that the different state of facts necessarily involves a different decision, and we accordingly remitted the case to them so that we might have their determination on the differing facts of the later year.

But these considerations are quite distinct from a case of a single transaction, involving a decision on a mixed question of law and fact, such as the present, where the issue has for once and all been litigated between the parties. For similar reasons I think that this Court is equally precluded from examining into the grounds of the Recorder's decision, and I decline to do so. I do not altogether regret this, for if the Statute declares the Recorder's decision to be "final and conclusive," which at least means "final and conclusive between the parties," and provides no appeal from it, I do not think that we should be astute to get behind it by indirect methods. I adopt the quotation

(1) [1910] 2 I.R. 521. (2) [1913] 2 I.R 462.
(3) Unreported.

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from Phillimore, L. J., in *The Commissioners of Inland Revenue* v. *Brooks* (1), given by Lord Sumner at p. 495—"If the two parties to a controversy have had the matter in dispute finally determined between them by the ultimate tribunal, they ought not, nor ought either of them, to be allowed to re-open this dispute on any such ground as that the matter which has been decided subsequently becomes an item in another account, even though this other account has in respect of its other items, or its casting to be inquired into by a fresh tribunal."

Lord Sumner adds that this begs the question, because it depends whether this is permissible or not upon the construction of the Act constituting the fresh tribunal. In the present case, however, we are dealing with the same subject matter of dispute, the same Commissioners and their powers under the same Act, so that I venture to think the observations of Phillimore, L.J., have full application.

It is, I suppose, immaterial whether we order the assessment based on the average return for the year 1921-22 when included for average with the years 1920-21 and 1922-23, as showing a loss of £382, to be affirmed, in which case the appellant can appeal to the House of Lords; or whether we make a declaration to similar effect and remit the case to the Commissioners to determine it according to such declaration, in which case the appellant can elect whether he will appeal to the Recorder from the Commissioners or to the House of Lords from this Court.

The Order of the King's Bench will be discharged and the appellant will pay the respondent the costs of the appeal with those in the King's Bench Division.

(1) [1915] A.C. 478.

ANDREWS, L. J. :—

It would be difficult to conceive a more remarkable situation than that which has been presented to us in this case. Mr. Aylmer, the Inspector of Taxes, who applied for this case stated to the Commissioners for the special purposes of the Income Tax Acts, succeeded in obtaining from the King's Bench Division an Order remitting the matter for the determination of the Commissioners pursuant to the Commissioners' own findings, that the sum of £1,000 in question was not an allowable deduction. Notwithstanding this direction he is dissatisfied with the Order and is the appellant in our Court. On the other hand, the tax payer, Mr. Mahaffey, against whom the direction has been given, asks us to affirm the Order of the King's Bench Division. The reason, however, for this strange attitude is not far to seek; for, if the Commissioners decide against the tax payer, he will be free to exercise his statutory right of appeal under section 196 of the Income Tax Act, 1918, to the Recorder of Belfast, who in respect of the previous year's assessment reversed the decision of the Commissioners and decided precisely the same point in reference to the same allowance in his favour. No Order will, accordingly, satisfy the appellant which will place it in the power of the respondent to bring the case again before the learned Recorder. He would apparently prefer a clean decision against him on the issue as to whether this sum of £1,000 was an allowable deduction, as this would leave his path clear for an appeal to the House of Lords.

A situation such as this makes one pause to think. It is not in the interests of the law that this jockeying for Courts should be permissible; it would be still less to its credit if it were countenanced. There must surely be something wrong if one of the parties to litigation can by finessing for position succeed in bringing the case for final adjudication before a Court which would with absolute certainty decide the case in his favour; whereas, if it came regularly before another tribunal, the decision might be adverse.

The existence of such an absurd and anomalous situation suggests to my mind the possibility of the application of

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the doctrine of res judicata; for, if it be held to apply, then all opportunity for divergence of decision disappears, and the determination of the learned Recorder given in the previous year must be recognised and given effect to by any Court before which the case may regularly be brought.

After a careful consideration of the authorities I am clearly of opinion that every element which it is necessary to establish for the application of the principle of res judicata is to be found in the present case. The issue is raised between the same parties, and relates to precisely the same subject matter, namely, the payment by Mr. Mahaffey of the sum of £1,000 in the year ending 31st March, 1921. The legal question involved is precisely the same, namely, whether this sum is a proper deduction in computing the respondent's profits for that year. The circumstances in which it was paid were fully investigated both by the Commissioners and by the Recorder when determining the proper legal assessment for the year ending 5th April, 1922. No new facts have since arisen or been ascertained. Indeed, no evidence at all was given by witnesses before the Commissioners on the second occasion, as it was agreed that the facts were identical with those proved in the previous year. No new legal issue was raised, even assuming, which I do not decide, that such new issue could in the circumstances have been advanced before or entertained by the Commissioners. The Recorder, sitting in his Court of competent jurisdiction, arrived at a "determination" which, by virtue of the provisions of section 196 (2), was "final and conclusive." We are left in no doubt either as to the point which he decided or as to the grounds of his decision. "In my opinion," he says, "the deduction of £1,000 claimed is a proper one and should be allowed on the ground that the payment of this sum was made in pursunace of an agreement which the appellant entered into for the purpose of his business and with a view to earning profits, and should be considered as having been made wholly and exclusively for the purpose of appellant's trade as a commission agent."

Having regard to the manner in which the legal aspect of the case has been dealt with by my colleague, I do not

intend to review the authorities; but I would refer to a passage from the judgment of Willes, J., in *Langmead* v. *Maple* (1), at p. 270, which appears to me to summarise the law in an apposite manner. "I apprehend," he said, "that if the same matter or cause of action has already been finally adjudicated on between the parties by a Court of competent jurisdiction, the plaintiff had lost his right to put it in suit either before that or any other Court. The conditions for the exclusion of jurisdiction on the ground of res judicata are that the same identical matter shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided." All the conditions here enunciated are complied with in the present case, for the question submitted to us is no less the same identical matter as was decided by the learned Recorder, because it now arises in an assessment for the year immediately succeeding that in which the point arose for his determination.

The conclusion at which we have arrived renders it unnecessary for us to express any opinion upon the points mainly discussed before us, namely—Whether the payment of £1,000 was a proper deduction in computing the respondent's profits for the year ending 31st March, 1921, as being money wholly and exclusively laid out or expended for the purposes of his trade, profession, employment, or vocation; and whether this is a question of law which can be considered by us in a case stated, or purely a question of fact.

Whilst I cannot have failed to form some opinion upon these questions, I refrain from giving any expression to it as unnecessary for the purposes of our decision; and I can only express the hope that before this Court is again asked to determine whether a question of this character is one of pure law, pure fact, or of mixed law and fact, an authoritative judicial pronouncement will have been made on the subject which will redound more to the credit of the law than the only explanation of the conflicting authorities

(1) 18 C.B.N.S. 256.

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which Scrutton L. J., could give in *Currie* v. *Inland Revenue Commissioners* (1), at p. 339, when he attributed the inconsistency of judicial decisions to "a very strong tendency, arising from the infirmities of human nature, in a judge to say, if he agrees with the decision of the Commissioners, that the question is one of fact, and, if he disagrees with them, that it is one of law, in order that he may express his own opinion the opposite way."

The case must go back to the Commissioners with our declaration as to the question submitted by them being res judicata, and that they should amend the respondent's assessment for the year ending 5th April, 1923, accordingly. *M'Kee.*

Solicitor for the appellant, *J. H. B. Gunning.* Solicitors for the respondent, *Wheeler & M'Cutcheon.*

J. McC.

(1) [1921] 2 K.B. 332.

BARBOUR AND MEGAW
v.
RUTHERFORD AND OTHERS (1).
(1925. No. 88.)

Practice—Trial of Issues between Co-Defendants—Claim by a Defendant against a Co-Defendant—Supreme Court of Judicature (Ireland) Act, 1877 (40 & 41 Vict. c 57), s. 27, sub-s. 3.

The plaintiffs, executors and trustees of the will of S.P. deceased, brought an action against five defendants R., A.B., C.B., C.P., and M.P., to have it determined to what share of the residuary estate of S.P. deceased, the defendant R. was entitled in the events which had happened. The statement of claim alleged that S.P. deceased by her will directed that the residue of her estate should be divided into four shares of which one share bequeathed to the defendant R. should exceed the others by £2,000, the other three shares being bequeathed to the other defendants. It alleged also that S.P. before her death made various gifts inter vivos to the defendants and that the defendant R. received £2,000 more than the others. It also alleged an agreement between all parties, at the date of the gifts, that the £2,000 given to the defendant R. should be deemed to be in satisfaction of the £2,000 bequeathed by the will. The defendants C.P. and M.P. filed a joint defence relying upon the said agreement and seeking an order that the defendant R. should specifically perform it and should bring the £2,000 into account in the estate of S.P. deceased, or in the alternative, seeking damages for breach of the said agreement. The defendants A.B. and C.B. also filed a joint defence relying upon the said agreement. The defendant R. entered an appearance to the writ but had not filed any defence.

On a motion on behalf of the defendants C.P. and M.P. the Court made an order declaring that delivery of their defence to the defendant R. should be deemed notice to her, under the Supreme Court of Judicature (Ireland) Act, 1877, s. 27, sub-s. 3, of their respective claims against her mentioned in their defence and directing that the questions in the action between them and her should be determined in the action. The Court made a similar order in favour of the defendants A.B. and C.B., who appeared on the motion, but refused to make a cross order in favour of the defendant R. because her defence had not then been filed.

MOTION. The action was brought by Richard Annesley Barbour and Isaac John Megaw against Harriet Anne Rutherford, Alice Buriss, Caroline Kate Barbour, Caroline Park, and Margaret Park—for an order determining the share of the moneys representing the residuary estate of Sara Park, deceased, to which the defendant Harriet

(1) In the Chancery Division before Wilson J.

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Anne Rutherford in the events which had happened, was now entitled. In their statement of claim the plaintiffs set out that Sara Park by her will dated the 19th July, 1919, bequeathed all the residue of her property to the plaintiffs on trust to realize the same and to divide it into four parts so that three of the parts should be equal and the fourth part should exceed each of the others by £2,000 and to pay one of the three equal parts to the defendant Alice Buriss, to pay another of the three equal parts to the defendant Caroline Kate Barbour, to pay another of the three equal parts to the children of Professor John Park, namely, John Park and the defendants Caroline Park and Margaret Park in equal shares, and to pay the fourth part to the defendant Harriet Anne Rutherford.

Sara Park on or about the 11th July, 1919, paid to the defendant Alice Buriss £2,000, to the defendant Caroline Kate Barbour £2,000, to the said John Park and the defendants Caroline Park and Margaret Park, and to the defendant Harriet Anne Rutherford £3,000, and on or about the 21st May, 1920, she paid to the defendant Alice Buriss £1,500, to the defendant Caroline Kate Barbour £1,500, to John Park and the defendants Caroline Park and Margaret Park £1,500, and to the defendant Harriet Anne Rutherford £2,500.

It was alleged by the defendants other than the defendant Harriet Anne Rutherford that, at the times when Sara Park made the payments to the defendant Harriet Anne Rutherford of sums exceeding by £1,000 each the sums paid to the other defendants and John Park, it was agreed between Sara Park, John Park, and the defendants that the defendant Harriet Anne Rutherford should accept the two sums of £1,000 in satisfaction of the £2,000 by which it was directed by the will that the share of the residue bequeathed to the defendant Harriet Anne Rutherford should exceed the other three shares.

Sara Park died on the 26th October, 1922, and Probate of her will was granted to the plaintiffs on the 9th March, 1923.

The defendants Caroline Park and Margaret Park entered a joint defence whereby they recited the above-mentioned agreement and averred that although the defendant

Harriet Anne Rutherford had received the sum of £2,000 in the lifetime of Sara Park, she refused to bring it into account in the estate of the deceased in breach of the agreement. They stated that at the trial of the action they would apply to the Court for an order declaring that Harriet Anne Rutherford should specifically perform the agreement or in the alternative that the Court should assess damages against her for breach of it.

The defendants Alice Buriss and Caroline Kate Barbour, entered a joint defence in similar terms.

The defendants Caroline Park and Margaret Park now moved for an order that the delivery of their statement of defence in the action to the defendant Harriet Anne Rutherford should be deemed notice to the said defendant under the Supreme Court of Judicature (Ireland) Act, 1877, sec. 27, sub-sec. 3, of their claims against her mentioned in their defence and that the questions between them and the defendant Harriet Anne Rutherford should be determined in the action.

Th defendants Alice Buriss and Caroline Kate Barbour appeared in support, but did not bring a separate motion.

The defendant Harriet Anne Rutherford had appeared to the writ, but at the date of the hearing of the motion had not filed any defence. She appeared at the hearing.

Ellison for the plaintiffs.

M'Kean for the defendants Caroline Park and Margaret Park.

There is no rule of Court dealing with a claim by one defendant against another defendant. [He referred to the Supreme Court of Judicature (Ireland) Act, 1877, sec. 27, sub-sec. 3, *Lindesay* v. *Darlington* (1), and *Marner* v. *Bright* (2)].

Hume, for the defendants, Alice Buriss and Caroline Kate Barbour, asked for a similar order on the ground that their defence had been filed.

Warnock, for the defendant Harriet Anne Rutherford, asked for a cross order against the other defendant, and consented to the order going against her.

(1) [1916] 1 I.R. 299 (2) 11 Ch Div. 349 note.

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WILSON, J. :—In this case, following *Lindesay* v. *Darlington* (1), I shall make the order sought in favour of the defendants Caroline Park and Margaret Park. I shall make a similar order in favour of the defendants Alice Buriss and Caroline Kate Barbour, since they have filed their defence in the action. I cannot make now a cross order in favour of the defendant Harriet Anne Rutherford since she has not as yet filed her defence. I shall declare the plaintiffs entitled to their costs and reserve the costs of all the defendants except Harriet Anne Rutherford, to whom I cannot give any costs.

The order made was as follows :—

This Court doth order that the delivery of the statement of defence of the defendants Caroline Park and Margaret Park to the defendant Harriet Anne Rutherford be deemed to be notice to the said defendant under the Supreme Court of Judicature (Ireland) Act, 1877, sect. 27, sub-sec. 3, of the claims of the said defendants Caroline Park and Margaret Park against the said defendant Harriet Anne Rutherford as set forth in the said statement of defence and that the questions between the said defendants Caroline Park and Margaret Park, and the said defendant Harriet Anne Rutherford be determined in this action.

And it is also ordered that the delivery of the statement of defence of the defendants Alice Buriss and Caroline Kate Barbour to the defendant Harriet Anne Rutherford be deemed to be notice to the said defendant under the Supreme Court of Judicature (Ireland) Act, 1877, sect. 27, sub-sec. 3, of the claims of the said defendants, Alice Buries and Caroline Kate Barbour against the said defendant Harriet Ann Rutherford as set forth in the set statement of defence, and that the questions between the said defendants Alice Buriss and Caroline Kate Barbour and the said defendant Harriet Anne Rutherford be determined in this action.

And this Court doth declare the plaintiffs entitled to their costs of and incidental to this motion and order, and doth reserve the question of the costs of the defendants Caroline Park and Margaret Park and Alice Buriss and Caroline Kate Barbour.

Solicitors for plaintiffs :—*M. Wylie.*

Solicitor for defendant Rutherford :—*Martin H. Turnbull & Co.*

Solicitor for defendants Buriss and Barbour :—*John M'Kee.*

Solicitor for defendants Park :—*A. S. Merrick.*

A.A.C.

(1) [1916] 1 I.R. 299.

[In the Court of Appeal]
(1925. No. 146.)

Appeal
1925
June 9
June 24

IN THE MATTER OF THE ESTATE OF WILLIAM BEERS, DECEASED.

THE LAND PURCHASE TRUSTEE NORTHERN IRELAND

v.

WILLIAM MACLEAN BEERS and GEORGE MACLEAN BEERS (1).

THE LAND PURCHASE TRUSTEE NORTHERN IRELAND v BEERS

Settlement—Real Estate—Absence of Words of Limitation—Equitable Estate—Intention of Settlor.

By deed reciting that the settlor was desirous of making provision for his daughters and of settling the lands thereby granted for the use of his son W.B. and the issue of such son, the settlor granted to W.K. and his heirs certain lands held in fee farm, subject to the life estate of the settlor, to hold, from the decease of the settlor, to the said W.K. and his heirs upon trust that the lands should be charged with the sum of £1,000, and subject thereto upon trust and to the use of the said W.B. for his life and after his death to the use of his sons successively according to their respective seniorities in tail male, and in default of such issue to the use of the daughters of the said W.B. as therein with divers remainders over. Power was thereby given to W.B. to charge a jointure for his then or any after taken wife. The settlor died in October, 1880, and thereupon W.B. entered into possession of the lands. W.B. died on 29th Septemebr, 1919, leaving a widow, having had four sons, three of whom survived him and the eldest of whom W.M.B. predeceased his father, leaving one child his son W.M.B. born in January, 1903.

Held by the Court of Appeal affirming the judgment of Wilson J. that the intention of the settlor to create an estate in tail male in favour of his sons of W.B. being clear, and there being no technical terms in the words of the trust in conflict with that intention that an equitable estate in tail male was thereby settled. In re Bostocks Settlement (1921) 2 ch. 469) distinguished.

Per Andrews L.J.: "In creating a trust a person need only make his meaning clear as to the interest he intends to give without regarding the technical terms of the Common Law in the limitation of legal estates. An equitable fee may be created without the word 'heirs' and an equitable entail without the words 'heirs of the body' provided words be used which though not technical, are yet popularly equivalent or the intention otherwise sufficiently appears upon the face of the instrument." The passage in Lewin on Trusts, 12th Edition, p. 124, quoted and applied.

(1) In the Court of Appeal before Moore and Andrews L.JJ.

Appeal 1925

THE LAND PURCHASE TRUSTEE NOTHERN IRELAND v BEERS

SUMMONS. By an indenture of settlement dated the 16th day of February, 1867, and made between William Beers of the first part, William Beers (jun.) his only son, of the second part, Mary Anne Horner and Jane Leslie Thompson, daughters of the said William Beers, of the third part, and William Keown of the fourth part, the said William Beers being desirous of making provision for his daughters and of settling the lands thereby granted for the use of his son, the said William Beers, Junior, and the issue of such son, granted to the said William Keown and his heirs the town and lands of Ballysheilmore, in the County of Armagh, subject to the life estate of the settlor which was thereby accepted and reserved, to hold from the decease of the settlor to the said William Keown and his heirs upon trust that the said lands should be charged with the sum of £1,000 payable as therein mentioned, and subject to the said charge upon trust and to the use of the said William Beers, Junior, for his life, and after his death to the use of his sons successively according to their respective seniorities in tail male, and in default of such issue to the use of the daughters of the said William Beers, Junior, as therein mentioned with divers remainders over; and by the said settlement power was given to the said William Beers, Junior, to charge a jointure for his then or any after taken wife not exceeding £100 per annum. The said William Beers, the settlor, died on the 3rd day of October, 1880, and thereupon the said William Beers, Junior, entered into possession of the said lands. The said William Beers, Junior, died on the 29th day of September, 1919, leaving the said Mary M'Leod Beers, his widow, and having had issue four sons only, namely, William Maclean Bees, his eldest son, who died on the 27th day of August, 1916, and George Maclean Beers, his second son, Leslie Maclean Beers, his third son, and Philip Grove Maclean Beers, his fourth son, all of whom with the exception of his eldest son, William Maclean Beers, survived the said William Beers, Junior.

The said William Maclean Beers No. 1 left him surviving one child, William Maclean Beers, No. 2, who was born on the 13th day of January, 1903, and was consequently now of age.

WILSON, J., held that subject to the jointure payable to the settlor's widow the balance of the income was payable to the defendant William Maclean Beers as tenant in tail under the settlement, a clear intention being manifested to convey the fee although the words of inheritance were not used.

The defendant George Maclean Beers appealed to the Court of Appeal (1).

Monroe, K.C., and *J. G. Dougherty* for the appellant:--

The question at issue in the present case is to whom was the income of certain funds payable. The contest turns upon the meaning that is to be given to the words "in tail male." We submit that as the limitations of the settlement after the decease of William Beers, Junior, "to his sons successively according to their respective seniorities in tail male "contain no words of inheritance, the sons take only successive life estates. This settlement was executed before the Conveyancing Act, 1881, and we submit that the law applicable is properly stated in Tudor's Real Property (4th edition) at pp. 163-4. "In conveying a fee simple by deed, the words 'in fee simple' are now sufficient (Conveyancing Act, 1881, s. 51), though prior to that Act such words would have no effect (Shep. Touch, 106). If those words are not used proper words of inheritance must be used, as "to A. and his heirs," for, if the conveyance were "to A. for ever," "to A. and his assigns for ever," A. would only take an estate for life (Litt. sect. 1). It is immaterial that A. is directed to pay a sum of money (*Wright* v. *Dowley*), 2 Wm. Bl. 1185." Again at p. 199 the same author states "in deeds technical words are required in order to create an estate tail in the same mode, ... that technical words are required for the creation of an estate in fee simple by deed. Under sect. 51 of the Conveyancing Act, 1881, it is sufficient to use the words "in tail." If these words are not used it is necessary to have words of inheritance, as the word "heirs." "For," as observed by Coke, "seeing every estate tail was a fee

(1) Before Moore and Andrews, L.JJ.

Appeal 1925

THE LAND PURCHASE TRUSTEE NORTHERN IRELAND v BEERS

simple at the common law, and at the common law no fee simple could be in feoffments and grants without the words 'heirs,' and that an estate in fee tail is but a cut and restrained fee, it followeth that in gifts in a man's lifetime no estate can be created without the word 'heirs.' " (Co. Litt. 20 a). Thus if a person gives lands or tenements "to a man and his seed," or "the issue," or "children of his body," he will only take an estate for life, because there are no words of inheritance.

We strongly rely on *Meyler* v. *Meyler* (1), where Chatterton, V.C., held that he was precluded by the authorities from going into the question of intention. *Meyler* v. *Meyler* (1) is referred to by Gibson J., in *Champ* v. *Champ* (2), where he says, "writers of great authority have considered that interests in trust estates may be created and moulded without adopting the technical terms of common law limitations. Lord Justice Deasy appears to have thought this opinion well founded from his judgment in *Lysaght* v. *M'Grath* (3). *Meyler* v. *Meyler* (1) is, however, an authority the other way. Where there are ordinary limitations, equity follows the law in the case of an executed trust." We rely on *in re Whiston's Settlement*, *Lovatt* v. *Williamson* (4). We rely mainly on *in re Bostock's Settlement* (5), which we submit governs the present case. The limitations must be read strictly and so read only give life estates to the sons of William Beers, Junior. *In re Bostock's Settlement* (5) overruled *in re Tringham's Trusts* (6) where it had been held by Joyce J. that he could consider the question of intention. The words used by Younger LJ., in *In re Bostock's Settlement* (5) at p. 490 apply to the present case. "Here we have an executed document complete in its terms, expressed in the language of legal limitations, and the result in such a case is thus put by Sargant, J., in *In re Monckton's Settlement* : "The rule is fairly well settled that in the case of an executed document as distinguished from an executory

(1) 11 L.R.I. 522.
(2) 30 L.R.I. 72 at p. 86
(3) 11 L R.I. 142 at p. 168.
(4) [1894] 1 Ch. 661.
(5) [1921] 2 ch 469.
(6) [1904] 2 ch. 487.
(7) [1213] 2 ch. 642.

document the same words of limitation are necessary to convey an equitable estate in fee simple as would have been necessary if the conveyance had been one of a legal estate in fee simple. Equity follows the law in that respect." Again in *In re Bostock's Settlement* (1) Younger, L. J., says: "We are recognizing here a binding rule of construction. We are disregarding intention altogether, as in duty bound." Effect cannot now be given to the settlor's intention. We submit that the Court is bound by the long standing rules of construction, and that the decision of Wilson, J., should be reversed.

[They also referred to *In re Moses Houston, Deceased* (2), *In re Stinson's Estate* (3), *In re Cross's Trusts* (4), *In re Murphy & Griffin's Contract* (5), *In re Cliver's Settlement* (6), *In re Nutt's Settlement* (7), *In re Gillies Settlement* (8), *In re Bennett's Estate* (9), *In re Irwin* (10), *Dearberg* v. *Letchford* (11).]

M'Gonigal, K.C., for the defendant William Maclean Beers :—There is no case on all fours with the present, which we submit contains something more than do the cases relied on by the appellant. That something more consists of the words "in tail male."

In Lewin's Law of Trusts (11th edition) at p. 120-121, three rules are given as containing the principles applicable to declarations of trusts.

The first rule is " In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word 'heirs,' and an equitable entail without the words ' heirs of the body ' provided words be used which though not technical, are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument."

(1) [1921] 2 ch. 469 at p 491
(2) [1909] 1 I.R. 319
(3) [1910] 1 I.R. 47
(4) [1915] 1 I.R. 304
(5) [1919] 1 I.R. 187
(6) [1905] 1 Ch 191
(7) [1915] 2 Ch 431
(8) [1917] 2 Ch 205
(9) [1898] 1 I.R. 185
(10) [1904] 2 Ch 752
(11) 72 L.T.R. 489

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THE LAND PURCHASE TRUSTEE NORTHERN IRELAND v BEERS

The third rule is "Though technical terms be not absolutely necessary, yet where technical terms are employed they should be taken in their legal and technical sense. Lord Hardwicke indeed once added the qualification, 'unless the intention of the testator or author of the trust plainly appeared to the contrary.' But this position has since been repeatedly and expressly overruled, and at the present day it must be considered a clear and settled canon that a limitation in a trust, perfected and declared by the settlor, must have the same construction as in the case of a legal estate executed."

It is the first, not the third rule, which applies to the present case. The distinction between a conveyance to a man simpliciter, and a conveyance with something more, has been recognized both in England and Ireland, and we submit that different considerations apply in these two cases. In *In re Bennett's Estate* (1), Kenny, J., if he could have found words which though not technical were popularly equivalent, would have given effect to them. Once the realm of popular expressions is reached, technical rules of law are got rid of. The rule applied in *In re Bostock's Settlement* (2) does not apply here. None of the cases relied on by the appellant deals with successive limitations. *In re Irwin* (1) is distinguishable from the present case. There Buckley J. says: "There was nothing to indicate the estate the trustees were to take. Inasmuch as he (the settlor) used on words of limitation, and no words which, although not technically words of limitation, might have tended to express that he intended to pass all his share and interest under the will, so that the grantee should have all that which he the grantor had; the result was that he had not passed the absolute interest." Later on in his judgment Buckley J. said, "An equitable estate in fee simple will . . . pass without words of limitation if you find words that express that the grantee is to have all the estate and interest which the grantor had." We confidently submit that if as in a deed there are words which popularly mark out the interest which was given to

(1) [1898] 1 I.R. 185. (2) [1921] 2 Ch. 469.
(3) [1904] 2 Ch. 752, at p 763—764

the grantor, effect can and should be given to them. We submit that the law applicable is correctly expressed in Williams on Real Property (23rd edition) at p. 194-195.

Trusts declared in favour of one and his heirs, or of him and the heirs of his body, or of him for life, will create equitable estates in fee simple, fee tail, or for life, analogous to the legal estates conferred by similar limitations. But it is not necessary, in making a declaration of trust, to use the same technical expressions as are required to limit estates at law. Thus equitable estates in fee simple or tail may be conferred without the use of the words heirs or heirs of the body, if the intention be clear. But where formal and complete limitations of the equitable estate in land are made by deed, an intention to confer a fee must be clearly expressed; for, if not, such a limitation to one simply, without further words, will only give him a life estate, as in the case of a similar grant at law.

In *In re Bostock's Settlement* (1) strict legal language had been used, which received its strict legal meaning. In that case Warrington, L. J. (at p. 483) expressed his agreement with the statement in Lewin on Trusts (12th ed.) p. 124, that "in creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates.

An equitable fee may be created without the word "heirs," and an equitable entail without the words "heirs of the body," provided words be used which, though not technical, are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument." He went on to say that "it is not disputed that this passage expresses a correct view of the law," but that it did not apply to the case before him.

[*Cur. adv. vult.*

(1) [1922] 2 Ch. 469.

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MOORE LJ.: The settled estate has been sold to the occupying tenants pursuant to the provisions of the Irish Land Purchase Acts, and the proceeds or part of them are now in the hands of the Land Purchase Trustee for Northern Ireland, at whose instance the summons before us on appeal was issued.

Having stated the facts above set out which were verified by an affidavit of Miss M. E. Horner filed in support of the summons, the Lord Justice proceeded:—The question raised is, to whom the income of the fund now subject to said trusts is now payable?

The contending parties are the two defendants, William Maclean Beers, No. 2, who is the only son of William Maclean Beers, No. 1, who was the eldest son of William Beers, Junior, who was the eldest son of the settlor, and George Maclean Beers, who is the next brother to William Maclean Beers, No. 1, and second son of William Beers, Junior.

The question for us is whether the words following the life estate to William Beers, Junior, "to the use of his sons by his present or any aftertaken wife successively according to their respective seniorities in tail male" without technical words of limitation such as 'heirs of the body in tail male' give an estate tail to William Maclean Beers No. 1, or only an estate for life.

A long line of decisions, which up to the year 1898 are summarized by Kenny, J., in *In re Bennett's Estate* (1), and are further brought up to 1917 by O'Connor, M. R., in *In re Cross's Trusts* (2), though in that case he did not follow them—laid down the principle that equitable estates created by executed trusts are subject to the same rules of legal construction according to the practice of conveyancing as legal estates, and that it was not permissible to supplement the omission of words of limitation by ascertaining the intention of the settlor.

This is in general conformity with the authorities to which I have referred, but opposed to *In re Moses Houston*

(1) [1898] 1 I.R. 185 at p 194-195
(2) [1915] 1 I.R. 304 at p 310-314

Deceased, *Rodgers* v. *Houston* (1), and to *In re Stinson's Estate* (2), where under varying circumstances the Court looked to the intention of the settlor, not only from the actual words used in the operative part of the instrument, but from its recitals and its general scheme.

I must admit that against my own inclination Mr. Monroe in his excellent argument for a time convinced me that the case of *In re Bostock's Settlement Norrish* v. *Bostock* (3), a decision of the English Court of Appeal, if followed, compelled me in the present case to follow the former line of authority, to ignore the manifest intention of the settlor, and to hold that William Maclean Beers No. 1 only took an estate for life for want in the limitation of the words "heirs of the body in tail male," and that therefore his brother George Maclean Beers took as the next tenant for life to the exclusion of William Maclean Beers No. 2.

But having considered the matter after discussion with my colleague, Andrews, L.J., who has on so many occasions assisted me, I have come to the conclusion that *In re Bostock* (3) does not apply, as there were no words of art in that case—whether popular (if words of art can be said to be popular) or technical.

I leave Lord Justice Andrews to deal fully with this authority, merely stating that I concur in his reasoning.

But accepting Mr. Monroe's submission that under this settlement those entitled in succession only took equitable estates and that following the decision *In re Bostock's Settlement* (3) the rule of construction must be the same as in the case of legal estates executed. What is that rule? I have found one case which is referred to in many of the text books, and in some subsequent authorities, and I cannot find that it has anywhere been overruled. Of course the particular terms whether used or omitted, as the case may be, from any settlement are not sufficient without more to establish a general rule.

The following was a case sent for the opinion of the Court of Common Pleas by the Vice-Chancellor, *Galley* v. *Barrington* (4). [His Lordship then read the case there

(1) [1909] 1 I. R. 319 (2) [1910] 1 I. R. 47 (3) [1912] 2 Ch 469
(3) 2 Bing 387.

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submitted, for the opinion of the Court.] While it is unfortunate for us, that owing to the practice then prevailing as regards cases sent by the Court of Chancery for the opinion of the Courts of Common Law, we are not in possession of the reasons for any considered judgment such as this yet I think that it is possible for us under this authority and notwithstanding *In re Bostock's Settlement* (1) as Andrews LJ. has disinguished it, to affirm the decision of Wilson J., and I am glad that we can legally carry out the expressed intention of the settlor.

All parties will get their costs of the hearing before Wilson J. We will order that Wm. Maclean Beers gets his costs out of the moneys in the hands of the Public Trustee of the hearing and of the appeal, the defendant George Maclean Beers in the special circumstances of this case to have the sum of ten guineas out of the said fund on account of his costs of the appeal, in which he has failed.

ANDREWS, L. J. It has been forcibly argued by Mr. Monroe on behalf of George Maclean Beers that the present case is conclusively ruled in his favour by the decision of the Court of Appeal in England in the recent case of *In re Bostock's Settlement* (2). Having regard to his line of argument I feel it my luty to preface my comments upon that case by saying that it must be clearly understood that this Court will always, as did the late Court of Appeal in Ireland, pay the greatest possible respect to the decisions of the Court of Appeal in England; but we are in no sense bound by their decisions, and we shall always exercise our own independent judgment, not hesitating to differ from them if we deem it necssary, but doing so at the same time with natural reluctance.

After a very careful examination of the facts, arguments and judgments in *In re Bostock's Settlement* (2), I am, however, clearly of opinion that this present case differs from it in certain fundamental and essential respects, and that we can affirm the decision of Mr. Justice Wilson, as in my opinion we ought to do, without expressing any disapproval of that decision.

(1) [1921] 2 Ch. 469

By a settlement made upon William Bostock's second marriage it was recited that the intended husband was seised in fee simple of certain freehold lands subject to mortgages, and he conveyed the same to trustees to hold unto the trustees in fee simple to certain uses which it is unnecessary to refer to in detail, and afterwards "in trust for the child or children of the said William Bostock now born or hereafter to be born who shall attain the age of 21 years, and if more than one in equal shares as tenants in common and if there shall be no such child then in trust for the right heirs of the said William Bostock." The settlement contained other clauses, which, in the opinion of the Court of Appeal, amounted to a sufficient indication of an intention that the children should take absolute interests in the freeholds; but they held that they could not give effect to such indication, for, to quote the words of the head note, "the limitations in trust having been perfected and declared by the settlor, they must have the same construction as in the case of legal estates executed, and therefore that in the absence of words of limitation the children took life estates only in the freeholds."

The question which the Court had to determine in that case was put thus by Lord Sterndale, M.R., at p. 480:— "Whether if strict conveyancing language with a definite legal meaning is used in the creation of a trust of an equitable estate, it is competent for a Court of Equity to disregard that legal meaning where a contrary intention appears from the rest of the deed and construe the deed according to that intention." He proceeded to refer to statements in old books of authority on conveyancing relied upon by the appellant in support of the proposition that if the intention were clear no particular words are necessary to create a trust of equitable estates such as are necessary in the case of legal estates, and, therefore, that whatever words were used, the Court could and would inquire into the intention and construe the deed accordingly. The learned Master of the Rolls said he had looked at these passages carefully and in his opinion they established the first half of the contention, but they did not establish the second. To leave no doubt as to his meaning he added that, having examined the text books and authorities, he thought the true result was that stated in Lewin

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on Trusts, 12th ed., p. 125:—"But though technical terms be not absolutely necessary, yet where technical terms are employed they shall be taken in their legal and technical sense. Lord Hardwicke, indeed, once added the qualification 'unless the intention of the testator or author of the trust plainly appeared to the contrary.' But this position has since been repeatedly and expressly overruled, and at the present day it must be considered a clear and settled canon that a limitation in a trust perfected and declared by the settlor must have the same construction as in the case of a legal estate executed." Applying this principle, as in my opinion he properly did, to the case before him, the learned judge held that, as strict legal conveyancing language had been used, it must receive its strict legal meaning, and that in the absence of the word "heirs" the children took life estates only.

To the like effect is the judgment of Warrington, L. J. He proceeded, however, to cite a further passage from Lewin on Trusts, 12th ed., p. 124, to which I direct special attention because of its application to the present case, that "in creating a trust a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word "heirs" and an equitable entail without the words "heirs of the body," provided words be used which, though not technical, are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument." "It is not disputed," he added, "that this passage expresses a correct view of the law," but he held, and if I may presume to say so, rightly held, that it did not apply to the case before him, and that the principle which did apply to that case was that stated on page 125 of the same book, which I have cited in my extract from the judgment of Lord Sterndale, M.R.

In considering the true ground and limit of their decision, it must be remembered that what Warrington and Younger, L. J. J., empasise most strongly in their judgments is that there was nothing in the settlement before them which would justify the Court in saying that its operative provisions were incomplete or imperfect; that technical terms and forms of conveyancing were used, and

that no basis could be found in it for reforming or rectifying it.

When the passages which I have cited and the special facts of the case to which I have called attention are borne in mind, I find the decision of far less general importance and of a much less revolutionary character than has been generally assumed. I find nothing in it which prevents us deciding this case in accordance with the obvious intention of the settlor. Indeed, if there were no other authority to guide us, I would find sufficient in the passages which I have read from the judgments to necessitate our deciding this case in accordance with such intention.

I pass over the recital in the deed now before us with the brief comment that it was the settlor's expressed desire to settle the lands upon and for the use of his son, William Beers, Junior, and his "issue," this word having prima facie a wider and more comprehensive meaning than the word "children." I come to the operative part of the deed, and find that, after a declaration of trust in favour of William Beers, Junior, and his assigns during his life, there follows a use to "his sons by his present or any after taken wife successively according to their respective seniorities in tail male."

These are the words which this Court is asked to construe. It is not, for it could not be, denied that the settlor's clear intention was to create an estate in tail male in favour of the sons of William Beers, Junior; but it is contended that effect cannot be given to this intention because the settlor expressed it in this popular or descriptive language rather than in the technical language of "heirs male of the body," which is admittedly necessary to create an estate tail under legal limitations contained in a deed executed, as was this settlement, prior to the Conveyancing Act, 1881. This contention must fail. Unlike *In re Bostock's Settlement* (1) there are no technical terms in the words of the trust which we are asked to construe in any way in conflict with the admitted intention of the settlor to which terms, had they been used, a legal and technical meaning would necessarily be attributed by the Court. The first half of the proposition which Lord Sterndale holds to be established by the authorities applies, namely, that if the intention is clear no particular words are necessary to

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create a trust of equitable estates such as are necessary in he case of legal estates. So, too, it is the passage in Lewin on Trusts 12th ed., at p. 124, which applies to the present case, whereas it was the passage at p. 125 that was properly held to apply to the construction of the settlement in *Bostock's* (1) case. The words "in tail male" are not, or at least were not prior to the Conveyancing Act, anything more than the popular equivalent of "heirs male of the body," but they were sufficient according to the proposition expressly approved of by Warrington, L. J., to create an equitable entail without the use of the words "heirs of the body."

This critical analysis of the only case amongst the many recent authorities both in England and Ireland which could be relied upon to prevent us giving effect to the obvious intention of the settlor, would suffice for the purposes of my judgment, but, having regard to the argument addressed to us, I would like to add a few words. No doubt the decision of Joyce J. in *In re Tringham's Trusts* (2) must be taken to be expressly overruled by *In re Bostock's Settlement* (1); though I must not be taken as expressing any opinion as to the attitude which the Court should have adopted had an application been made to rectify the settlement. The decision of Farwell J. in *In re Oliver's Settlement* (3) has generally been assumed to be based entirely upon *In re Tringham's Trusts* (2); but I agree with Warrington, L. J., that it may be supported on the ground that the trust which was under consideration in that case was to "convey" the estate, and, therefore, executory. The decision of James V.C. in *Pugh* v. *Drew* (4) is also supported on the ground that the trust which was declared by reference was executory.

But I must not allow myself to be tempted to make a further review of the authorities, and, in particular, I must refrain from expressing disapproval of any case, even if I do not agree with it, which is not in direct conflict with our decision. I content myself with referring in conclusion to the case of *Lysaght* v. *M'Grath* (5), which is, I believe, the only reported Irish case in which the question

(1) [1921] 2 Ch. 469 (2) [1904] 2 Ch. 487. (3) [1905] 1 Ch. 191
(4) 17 W.R. 988 (5) 11 L.R.I. 142

was brought before the late Irish Court of Appeal; and I am glad to say that I find that Deasy, L. J., in his judgment in that case cites with at least tacit approval the passage from Lewin on Trusts to which I have already referred as applying to the present case. I confidently base my judgment upon that passage which has passed unaltered through successive editions of that standard work, and has been endorsed by appellate tribunals in both England and Ireland of co-ordinate jurisdiction with our own Court.

The decision of Wilson J. must be affirmed.

Solicitors for the appellant George Maclean Beers :— *Robert H. Orr & Sons.*

Solicitors for the defendant William Maclean Beers :— *William Fry & Sons.*

J. M'C.

Ch. Div.
1925
June 22

CAUGHEY
v
COPELAND.

In re PATTON deceased.
CAUGHEY v. COPELAND AND OTHERS (1).
(1922. No. 134.)

Will—Direction to Sell Realty—Mixed Fund of Realty and Personalty—Charitable Legacies—Annuity—No Direction as to Payment of Debts, Legacies and Annuity.

T.P. by his will directed that his real property, not specifically devised, should be sold and all the remainder of his property realised. He also directed that his debts, funeral and testamentary expenses should be paid, an annuity provided for his sister A.C., and the payment of certain legacies, all charitable save one. T.P. died within three months of making his will.

Held, by Wilson J., that although the testator had directed the sale of his realty and personalty, he not having directed that the proceeds should form a mixed fund the primary fund out of which the debts, funeral and testamentary expenses, the annuity and the legacies should be paid was the pure personalty and that the realty was only charged in aid of the pure personalty in so far as it proved insufficient for the payment of all charges except the charitable legacies which lapsed as far the pure personalty proved insufficient.

SUMMONS—1. To determine the question as to the validity of the charitable legacies bequeathed by the will of Thomas Patton, deceased, so far as they are charged upon and payable out of the testator's lands or the monies arising from the sale thereof, and also to determine in what proportions the said charitable legacies should be borne by the lands and pure personality respectively.

2. For an order to determine in what manner the annuity of £2 10s 0d per week bequeathed by testator to his sister, Agnes Copeland, ought to be provided for.

Thomas Patton by his will dated the 30th January, 1922, gave the following directions:—"I direct my house property to be sold and all the rest, residue and remainder of my property to be realised and after payment of my debts, funeral and testamentary expenses, I direct that an annuity be provided for my sister Agnes Copeland at the rate of £2 10s 0d per week during her life by purchase or otherwise as my executor thinks right. After providing for said annuity, I leave £100 to my assistant, William Irwin, £100 to the Presbyterian Orphan Society, £50 to the Comber Nursing Society, £300 to First Comber Presbyterian Church, also £100 to the trustees of First Comber Presbyterian Church to be invested and the income de-

voted to prizes annually for the Sunday School Children, £100 each to King Street Hospital, Belfast, and Templemore Avenue Hospital, Belfast, all the rest, residue and remainder of my property, I direct to be divided equally between the children of the late Thomas Patton, son of my cousin, John Patton."

All parties agreed that the charitable legacies lapsed in so far as they were charged upon and payable out of the testator's land or the monies arising from the sale thereof, if in fact they were so chargeable.

Ellison for the plaintiffs stated the facts.

Pringle, K.C., for the defendants other than Mrs. Copeland :—

The will creates a mixed fund made up of the proceeds of the sale of the realty and the personalty. The legacies and the debts are to be paid pro rata out of that fund; accordingly the charitable legacies fail as regards the proportion of that fund which is composed of the proceeds of the realty and a pro rata proportion must be paid out of the part of the fund representing the personalty. See *Allan* v. *Golt* (1) and the cases therein considered in the judgment of Lord Justice James. Where a testator gives an absolute direction for the sale and conversion of all his property, followed by directions as to the payment of legacies, the Court has always held that a mixed fund has been created. See *Leonard* v. *Dowling* (2). In *Boughton* v. *Boughton* (3) it was held that there was no intention to create a mixed fund since the testator had given no direction to sell the realty at all. Here there was an absolute direction that the realty should be sold, followed immediately by directions that various legacies were to be paid.

As regards the other point, an annuity should not be purchased, but suffcient funds to meet the annual payments should be retained in the hands of the trustees. The annuitant is an old woman and the annuity is liable to fall in at any time.

(1) 7th App. Case 439. (2) [1916] 1 Rep. 359. (3) 1 H.L.C. 406.

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CAUGHEY v. COPELAND.

Monroe, *K.C.*, for the Ministry of Finance (as Charity Commissioners) :—

The testator directed that all his real estate was to be sold, but he did not say by whom, and he did not by any means direct that the proceeds of his realty was to be blended into one common mixed fund with his personalty. The executor took no estate in the realty at all, and had no interest in it whatever. There was no direction to the executor to pay anything out of any fund; consequently the primary fund is the personalty. There is nothing in the will from which an inference can be drawn that a mixed fund was intended from which the payments were to be made. In all the cases cited there was a gift of the realty and personalty to the same persons and a direction to pay out of a mixed fund or something that could be considered equivalent to such a direction. An express direction is required to make debts or legacies payable pro rata out of a fund arising from real and personal estate. See *Luckcraft* v. *Pudham* (1), *and Elliott* v. *Dearsley* (2). The whole matter is purely one of construction. Debts, legacies and the annuity are all payable primarily out of the personalty.

As regards the annuity, it should be purchased at once, otherwise the entire property would be tied up during the lifetime of the annuitant, there not being suffcient personalty to provide for the payment of the legacies and leave a balance of the fund which when invested would be sufficient to produce the full amount of the annuint.

Copeland for Mrs. Copeland urged the immediate purchase of an annuity.

Pringle, *K.C.*, in reply :—

The legacies are a charge on a mixed fund. The testator has directed a sale and the executors are entitled to sell the realty. The will shows the clearest possible intention to gather all assets into one fund.

Wilson, *J.*, having stated the facts as above, proceeded :

The question for decision is, has the will directed that out of the proceeds of the realty and personalty, the debts, funeral and testamentary expenses, the annuity and the pecuniary legacies shall be paid ratably, or has it only

(1) 48 L.J. Ch. 636. (2) 16 Ch. Div. 322.

charged the proceeds of the realty with their payment in aid of the personalty ? The will has not directed that the debts, funeral and testamentary expenses, the annuity and the legacies shall be paid out of the proceeds of the realty, and of the rest of the testator's property, and in my opinion the proceeds of the house property, all the realty not specifically derived passed under his will, when sold are only charged with the various payments in aid of the personalty so far as the latter is not sufficient to pay them. The result is that the personal property is the primary fund for payment of the debts, funeral and testamentary expenses, the provision of the annuity and then the payment of the pecuniary legacies including the charitable legacies. In so far as the pure personalty is not sufficient to pay the charitable legacies in their proper priority, the charitable legacies must abate ratably, as the testator died within three months of the execution of his will.

As regards the first question in the summons, I shall order that the testator's pure personal estate in due course of administration and after payment of all sums properly payable in priority to the charitable legacies, is the primary fund for the payment of these, and in so far as the same may not be sufficient these legacies lapse.

As regards the second question, I shall order that the annuity of £2 10s 0d per week for life bequeathed to Mrs. Copeland must be provided for by the purchase of an annuity out of the personal estate of the deceased so far as same may be sufficient in due course of administration and out of the proceeds of the sale of the realty so far as may be necessary in aid of the personalty. I shall refer it to the chief clerk to find out which reputable Insurance Company offers the most advantageous terms for the provisions of the said annuity.

Solicitor for the plaintiff—*F. J. Orr*, Belfast.

Solicitor for the defendant Copeland—*Alex. Stewart*, Belfast.

Solicitor for the minor defendants—*Messrs. Galway & Hawthorne*, Belfast.

Solicitor for the Ministry of Finance—*J. H. B. Gunning*, Belfast.

A.A.C.

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CLUB—EXPULSION OF MEMBER—*Resolution of Committee — Validity — Limited Liability Company Proprietor of Club—Articles of Association—Rules of Club—Powers of Committee.*] Prior to the year 1885 a working men's club was formed in N. In that year a Company was registered under the Companies Acts limited by shares called the "C.W.M. Club Company, Limited." The company acquired the property and premises of the club and held the club premises on a yearly tenancy subject to a rent. M., the plaintiff, was a proprietary member of the Club. On 2nd November, 1923, the committee passed a resolution to close the club every night at 11.30, and they adopted three by-laws (1) as to persons to whom bar refreshments should not be supplied; (2) prohibiting singing or excessive drinking, or disorderly conduct on the club premises, and (3) declaring that the club premises should be closed punctually at 11.30 p.m., when all games must have ceased. A printed notice containing these by-laws was posted in the rooms of the club some time prior to November 25, 1923. Acting under these regulations, the committee called upon M., the plaintiff, to attend a special meeting to investigate a charge that he had been guilty of disorderly conduct on the club's premises. M. did not attend nor offer any explanation, and at a subsequent meeting of the committee a resolution expelling him from the membership of the club was passed unanimously. In an action for a declaration that the plaintiff was still a member of the club:—*Held* by Wilson J. (1) that the committee were not in law the directors of the company and had no authority to exercise the powers of the directors to exclude the plaintiff from membership of the club; and (2) that the power of expulsion that existed had not been exercised by the committee in accordance with the procedure laid down in the rules of the club. *Murphy* v. *Synnott.*
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CONVERSION—*continued.*

administration of her personal estate were taken out by J. M'L. as attorney of W. T. M. *Held* by Wilson J., that on the death of E. M. her share of the proceeds passed to J. M'L. as part of her personal estate. *Entwistle* v. *Macoun.*
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CRIMINAL LAW—EVIDENCE—*Incest—Admissibility of deposition of witness resident out of jurisdiction*—12 & 13 *Geo.* 5. (*N.I.*) *c.* 5, *s.* 9.] R. G. was indicted for incest. S. M. G., a daughter of the accused, who had made a deposition at Petty Sessions in which she swore that her father the accused had committed the alleged offence, was called as a witness at the trial, and failed to appear. It was sworn that she could not be found, and was believed to have gone voluntarily into the Irish Free State, and to be residing in Lifford, County Donegal. At the trial held at Londonderry for the Winter Assize County of Northern Ireland her deposition was on the application of the Crown sent to the Grand Jury, who returned a true bill against the accused. This deposition was subsequently read to the petty jury, who having heard the accused's evidence, convicted him of the offence charged. *Held* by the Court of Appeal on case stated by Wilson J. under the Crown Cases Act, 1848 (36 & 37 Vict., c. 66) that the conviction should be quashed, inasmuch as it had not been shewn that the attendance of the witness whose deposition had been put in evidence could not have been procured by service on her of a writ of subpœna under clause 9 of the Customs and Excise (Adaptation of Enactments Order, 1924, No. 1 of 1924, I.F.S.). *Rex* v. *Robert Gilchrist.*
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INCOME TAX—
See REVENUE INCOME TAX.

HIGHWAY—NUISANCE—MOTOR CYCLE TRIAL RACES *on public highway—Negligence—New trial limited to assetment of damages—Fatal injury to spectator—"Volenti non fit injuria"—9 & 10 Vic., c. 93, R.S.C. 1905, Or. 40.*] Motor cycle trial races were held on the public highway on 28th April, 1923. H. M'K. was standing at the verge of the road, at about the middle of the course, watching the races, when a motor bicycle ridden by the defendant M. hit a bump in the road, wobbled, and struck H. M'K. and killed him. No sanction had been given by the proper authority to hold these races on the public highway. In an action under the Fatal Accident Act, 9 & 10 Vict., c. 93, brought by the mother of H. M'K. against M. the jury found that the holding of the motor speed trials rendered the highway on which they were held dangerous for persons lawfully using it. *Held* by the Court of Appeal (Moore and Andrews L.JJ.) (a) that this finding amounted to a verdict that the competition in which the defendants took their respective the finding of the jury, that the departs was a nuisance in law, (b) that ceased attended the speed trials as a spectator, could not be presumed to mean that he knew that the organisers of the meeting were doing an act which was unlawful, proper sanction

HIGHWAY—*continued.*

not having been obtained, and (c) that the finding by the jury that the deceased understood the risk he was running could not be sustained, and that on the findings of the jury the plaintiff was entitled to recover. *McKee* v. *Malcolmson.*

[APP. 120

INSURANCE—INSURABLE INTEREST—*Insurance of company's assets by sole shareholder—Reference to arbitration—Jurisdiction by arbitrator.*] The plaintiff, the owner of a timber estate, sold the whole of the timber to a company. Some of the timber was felled and some unfelled. The total price paid was £42,000, and this was satisfied by the allotment to the plaintiff, or his nominees of £42,000 fully paid £1 shares in the company, being all the issued shares. The company cut down the timber, and during the course of this work the plaintiff had become a creditor of the company for a sum of £19,000. The timber remained lying on the plaintiff's land, and was destroyed by fire on February 22, 1922. The plaintiff had subsequently to the sale to the company insured this timber against fire by policies which he had effected in his own name with a number of insurance companies, and he claimed against the companies on the policies. The matter was referred to arbitration, and the arbitrator by an award stated in the form of a special case, awarded (inter alia) that the appellant had not at any time during the currency of the policies any insurable interest in the timber, the subject matter of the policies. *Held* by the Court of Appeal (Moore and Andrews L.JJ.) affirming the judgment of the King's Bench Division (Sir Denis Henry, Bart. C.J. and Brown J.) that the award should be upheld on the ground that the plaintiff had no insurable interest in the timber destroyed. *Macaura* v. *The Northern Assurance Company, Limited.*

[K.B.D. 141, APP. 148

LAND REGISTRY—AGREEMENT TO PURCHASE REGISTERED LANDS—*Vendor subsequently registered as owner as from date previous to the agreement Specific Performance Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict., c.* 66). *Land Registry Rules* 1910 *Order IV. Rules* 30 *and* 31.

LAND REGISTRY—*continued.*

An agreement in writing was made between the plaintiff and defendant on 29th May, 1924, for the purchase of certain lands. The plaintiff sold as registered owner and the sale was to be completed in June, 1924. The plaintiff did not become registered as owner of the lands until 18th August, 1924, but was then registered as owner as from 8th January, 1924, the date of the original lodgment in the Registry and acceptance of his documents. *Held* by Wilson J. that the defendant was not entitled to rescind the contract as the plaintiff was absolutely entitled to be registered as owner as from 8th January, 1924, and on 18th August, 1924 (before time had been made of the essence of the contract) was registered as owner and in a position to convey the lands to the defendant. *M'Girr* v. *Devine.*

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LANDLORD AND TENANT (1)—RECOVERY OF POSSESSION—*"Alternative accommodation"—"Available"—Undesirable Tenant—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5 *c.* 17), *sect.* 5 (1) (*d*).] A cottier house situated at Moy, County Tyrone, was let to the defendants on a weekly tenancy, at the rent of three shillings per week. The defendants resided in this house. In a civil bill ejectment for overholding of the house and premises, the defendants claimed to be entitled to retain possession on the ground that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17) applied. On appeal by the plaintiff from a dismiss granted by the County Court Judge of Tyrone, Wilson J. held that the Act of 1920 applied, and found that the plaintiff reasonably required the dwelling-house for occupation as a residence for himself and that though alternative accommodation reasonably equivalent as regards rent and suitability in all respects were available for a desirable tenant yet the landlady thereof declined to let them to the applicants solely because of what she considered their unreasonable conduct as tenants of the premises sought to be recovered. Wilson J. however stated a case for the opinion of the Court of Appeal, whether alternative accommodation was

LANDLORD & TENANT—*continued.*

"available" for the applicants. *Held* by the Court of Appeal that the premises came within section 5, sub-s. (1) (d) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), and that the word "available" meant available for the tenant whom it was sought to eject. *Topping* v. *Hughes.*

[APP. 90

LANDLORD AND TENANT (2)—RECOVERY OF POSSESSION—*"Dwelling-house"—Premises built and used as a constabulary barracks—Premises used "for the public service"—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5 *c.* 17), *Sect.* 5, *Sect.* 12, *Sub-s.* 2, *Section* 13, *Sub-s.* 1.)] Certain premises known as the C. Police Barracks were demised by lease of 18th March, 1903, to Sir N. C. as receiver for the Constabulary Force in Ireland, for the public service, for the term of twenty-one years from January 1st, 1903. The premises were built and had always been used as a Constabulary Barracks. The rights vested in the lessee of the premises subsequently became vested in the defendant S.W. as receiver for the Royal Ulster Constabulary. In an action for recovery of possession of the premises, the defendants claimed to be entitled to retain posssion of them on the ground that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied. Brown J. held that the premises were primarily used as a dwelling-house to house the police of the district and that the defendants were protected by the Act and gave judgment accordingly. *Held* by the Court of Appeal (Moore and Andrews, L.JJ.) reversing the judgment of Brown J. that a tenant is not entitled to the protection of the Act unless he is in actual occupation, either personally or by his servant or agent, of the dwelling-house in respect of which an ejectment is brought, and that the defendant Watt was not in such occupation; and held also that to come within the Act, the premises, of which possession is sought must be a house, or part of a house let as a separate dwelling, and that the premises were not so let. *The Martin Estates Company Limited* v. *Watt and Hunter.*

[APP. 79

LANDLORD AND TENANT (3)—REPAIR OF PREMISES—*Premises let in separate floors—Injury from overflowing cistern—Absence of contractual liability — Control of premises — Negligence.*] The plaintiff was the tenant of the ground floor in premises of which the defendant was the landlord. Water overflowed from a cistern in the first floor occupied by another tenant of the defendant and caused damage to the plaintiff's goods. This having been discovered by the plaintiff, he informed the defendant, who employed a plumber to execute necessary repairs. In an action tried before Andrews L.J. a verdict was found for the plaintiff. On motion to set aside the verdict and judgment. *Held* by the Court of Appeal (Sir D. Henry, L.C.J., and Moore, L.J.) that on the evidence the landlord was not in control of the premises, and was therefore not liable to the plaintiff. *Carroll* v. *Routledge.*

[APP. 31.

LICENSING LAW—SALE OF GROCERIES ON LICENSED PREMISES—*Structural Alterations*—13 & 14 *Geo.* 5 (*N.I.*) *c.* 12, *s.* 6.] The defendant, the proprietor of a shop and premises at Straid, Co. Antrim, licensed for the sale of intoxicating liquor for consumption on the premises, on 23rd October, 1924, in the part of the premises in which the sale of intoxicating liquor was carried on, offered for sale a quantity of tea, sugar and other articles of grocery. The premises were not structurally adapted for use nor were they bona fide used exclusively as an hotel or as a refreshment house, railway refreshment room or restaurant. The defendant was summoned for having carried on a mixed business in his licensed premises after the 1st day of October, 1924. On the hearing of the summons before two Resident Magistrates at Carrickfergus Petty Sessions on the 18th day of November, 1924, the defendant was convicted and fined ten shillings. *Held* by the Divisional Court on case stated by the Justices pursuant to the Summary Jurisdiction Act, 1857 (20 & 21 Vict., c. 43), that the conviction was correct in law and must be upheld, inasmuch as section 6 sub-section 1 of the Intoxicating Liquor (N.I.) Act, 1923 (13 & 14 Geo. 5, c. 12), provides that nothing shall be sold on licensed premises except intoxicating liquor, tobacco, table

LICENSING LAWS—*continued.*

waters and food to be consumed on the premises. *R.* (*Silcock*) v. *Boyd.*

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LIMITATION, WORDS OF—Notwithstanding the absence of, an equitable estate in tail held to be created, the intention of the settlor being shewn by popularly equivalent words ... 191
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OWNER—Registered subsequently to sale as from a date prior to the sale could convey as owner 94
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POWER OF ATTORNEY—EVIDENCE OF, EXECUTED ABROAD — *Office Copy—Sufficient Evidence of Contents —Evidence of Execution—Identity of Donor—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict.* c. 41), *Sect.* 48, *Sub-sects.* (1) *and* (4).] P. M. died intestate and unmarried, and letters of administration were granted to the defendant J. M., a cousin of the deceased. P. M. had five brothers and three sisters, one, M. J. M., married Joseph M'L., and had eight children, including one called James M'L. James M'L. went to America with his father and mother between 38 and 50 years ago. Proceedings were instituted by the plaintiff as donee of a power of attorney executed by James M'L. to have the grant of administration revoked on the ground that he was nearer of kin than the defendant to the deceased. An office copy of the power of attorney purporting to have been executed by James M'L. was put in evidence on behalf of the plaintiff. *Held* by the Court of Appeal that section 48 sub-s. 4 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41) merely obviates the necessity for production of an original instrument by enacting that an office copy of an instrument deposited as therein provided shall without further proof be sufficient vidence of its contents, and that the section does not make such copy evidence either of the truth of the contents or of the identity of the person by whom the original was made. *O'Kane* v. *Mullan.*

[APP. 1

PRACTICE—Trial of issues between co-defendants—*Claim by a defendant against a co-defendant—Supreme Court of Judicature (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 57), *s.* 27, *sub-s.* 3.] The plaintiffs, executors and trustees of the will of S.P. deceased, brought an action against five defendants R., A.B., C.B., C.P., and M.P., to have it determined to what share of the residuary estate of S.P. deceased, the defendant R. was entitled in the events which had happened. The statement of claim alleged that S.P. deceased by her will directed that the residue of her estate should be divided into four shares of which one share bequeathed to the defendant R. should exceed the others by £2,000, the other three shares being bequeathed to the other defendants. It alleged also that S.P. before her death made various gifts inter vivos to the defendants and that the defendant R. received £2,000 more than the others. It also alleged an agreement between all parties, at the date of the gifts, that the £2,000 given to the defendant R. should be deemed to be in satisfaction of the £2,000 bequeathed by the will. The defendants C.P. and M.P. filed a joint defence relying upon the said agreement and seeking an order that the defendant R. should specifically perform it and should bring the £2,000 into account in the estate of S.P. deceased, or in the alternative, seeking damags for breach of the said agreement. The defendants A.B. and C.B. also filed a joint defence relying upon the said agreement. The defendant R. entered an appearance to the writ but had not filed any defence. On a motion on behalf of the defendants C.P. and M.P. the Court made an order declaring that delivery of their defence to the defendant R. should be deemed notice to her, under the Supreme Court of Judicature (Ireland) Act, 1877, s. 27, sub-s. 3, of their respective claims against her mentioned in their defence and directing that the questions in the action between them and her should be determined in the action. The Court made a similar order in favour of the defendants A.B. and C.B., who appeared on the motion, but refused to make a cross order in favour of the defendant R. because her defence had not then been filed. *Barbour and Megaw* v. *Rutherford*.

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RES JUDICATA—A deduction having been judicially allowed on an income tax assessment for the year 1921-22. The same item was allowable in respect of the year 1922-23 ... 167, 173
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REVENUE—INCOME TAX (1)—Dividends on shares—*Incomplete Gift—Intended Transfer—Declaration of Trust.*] In August, 1916, A who had no marriage settlement decided to make provision for his wife and infant daughter. A draft deed was prepared but from various causes was not completed until 29th April, 1919. The deed provided that A. and his wife were to hold the trust funds as to one half in trust for A.'s wife for life and as to the other in trust for A.'s daughter and other children of the marriage, if any. Among the trust funds were certain shares in W. C. & Company. At a Directors' Meeting of the Company held on 22nd February, 1917, A. told the Board that he was a trustee of these shares and asked for their approval to the transfer of them to himself and Mrs. A. as trustees for their daughter. The Board gave the authority, and although no transfer was actually made or presented, and the shares remained in A.'s name, the dividends thereon were thenceforth paid into an account of A. and Mrs. A. as trustees for the daughter. Prior to the directors' meeting A. informed his wife that he was going to transfer the shares into their joint names as part of the trust fund, and that in the meantime, and until the transfer was completed, he would himself hold the shares upon trust. The Commissioners for special purposes of the Income Tax stated their opinion that A.'s declaration of his intention coupled with his actions was a valid declaration of trust of the shares, and accordingly that the dividends for the years 1917/18 and 1918/19 were not part of A.'s income for the purposes of super-tax. This decision was affirmed by the King's Bench Division in Northern Ireland (Sir D. Henry Bart. C.J. and Brown J.) but was reversed by the Court of Appeal (Moore and Andrews L.JJ.). *Held* by the House of Lords (Viscount Cave C. and Lords Dunedin, Atkinson, Sumner and Buckmaster)

REVENUE.—*continued.*

affirming the Court of Appeal that there was not an immediate and complete declaration of trust but merely a declaration by A. of his intention to settle the shares, and of his intention meantime to keep them in medio, so that they might be ready when the trust was effectively declared, and that the whole transaction was inchoate until 1919 up to which date the dividends legally belonged to A. *Allan* v. *The Commissioners of Inland Revenue.*

[K.B.D. 50, APP. 59, H.L. 72

REVENUE—INCOME TAX (2)—GUARANTEE OF CUSTOMER'S LOAN—*Assessment — Deduction — "Money wholly and exclusively laid out for the purposes of the trade"—Res judicata—Income Tax Act,* 1918 (8 & 9 *Geo.*, 5 *c.* 40) *Schedule* D, 3 (*a*) *Cases I. & II. and s.* 196.] The respondent, a commission agent, was promised large orders by one of his customers if he would guarantee up to £1,000 the customer's loan from his bankers. The respondent did guarantee the loan, the customer failed, and the respondent was obliged to pay the sum of £1,000 to the bank under his guarantee. The respondent claimed to deduct this sum of £1,000 in computing the profits for the year ending 31st March, 1921, as "money wholly and exclusively laid out or expended for the purposes of the trade." The Commissioners for the Special Purposes of the Income Tax Acts on an appeal from an assessment decided that the £1,000 was not a proper deduction. The respondent appealed to the Recorder of Belfast, who reversed this decision and allowed the respondent the deduction claimed. The question came again before the Special Commissioners by way of an appeal from an assessment for 1922-23. The Special Commissioners who heard the appeal held that the Recorder's decision on the 1921-22 appeal did not prevent the question from being raised in connexion with the appeal against the assessment for 1922-23, and while ruling that the £1,000 was not an allowable deduction in deference to the decision of the Recorder regarding the previous assessment, they allowed the deduction claimed, and reduced the assessment accordingly. *Held* by the King's Bench Division (Sir Denis Henry, Bart. C.J. and Brown J.) that the matter should be remitted for determination to the Commissioners for the Special Purposes of the Income Tax Acts, pursuant to their findings, and *Held* by the Court of Appeal discharging the order of the King's Bench Division, that the case must go back to the Commissioners with a declaration that the question submitted by them was res judicata and that the respondent's assessment for the year 1922-23 should be amended accordingly. *Aylmer* (*Surveyor of Taxes*) v. *Mahaffey.*

[K.B.D. 167, APP. 173

SETTLEMENT — REAL ESTATE—ABSENCE OF WORDS OF LIMITATION—*Equitable Estate — Intention of Settlor.* By deed reciting that the settlor was desirous of making provision for his daughters and of settling the lands thereby granted for the use of his son W.B. and the issue of such son, granted to W.K. and his heirs certain lands held in fee farm, subject to the life estate of the settlor, to hold, from the decease of the settlor, to the said W.K. and his heirs upon trust that the lands should be charged with the sum of £1,000, and subject thereto upon trust and to the use of the said W.B. for his life and after his death to the use of his sons successively according to their respective seniorities in tail male, and in default of such issue to the use of the daughters of the said W.B. as therein with divers remainders over. Power was thereby given to W.B. to charge a jointure for his then or any after taken wife. The settlor died in October, 1880, and thereupon W.B. entered into possession of the lands. W.B. died on 29th September, 1919, leaving a widow, having had four sons, three of whom survived him and the eldest of whom W.M.B. predeceased his father, leaving one child his son W.M.B. born in January, 1903. *Held* by the Court of Appeal (Moore and Andrews, L.JJ.) affirming the judgment of Wilson J. the intention of the settlor to create an estate in tail male in favour of his sons of W.B. being clear, and there being no technical terms in the words of the trust in conflict with that intention that an equitable estate in tail male was thereby settled. In re Bostocks Settlement (1921) 2 Ch. 469) distinguished. Per Andrews L.J.: "In creating a trust a person need

SETTLEMENT—*continued.*

only make his meaning clear as to the interest he intends to give without regarding the technical terms of the Common Law in the limitation of legal estates. An equitable fee may be created without the word 'heirs' and an equitable entail without the words, 'heirs of the body' provided words be used which though not technical, are yet popularly equivalent or the intention otherwise sufficiently appears upon the face of the instrument." The passage in Lewin on Trusts, 12th Edition, p. 124, quoted and applied. *The Land Purchase Trustee Northern Ireland* v. *Beers.*

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WILL—DIRECTION TO SELL REALTY—*Mixed fund of realty and personalty—Charitable legacies—Annuity—No direction as to payment of debts, legacies and annuity.* T.P. by his will directed that his real property, not specifically devised, should be sold and all the remainder of his property realised. He also directed that his debts, funeral and testamentary expenses should be paid, an annuity provided for his sister A.C., and the payment of certain legacies, all charitable save one. T.P. died within three months of making his will. *Held* by Wilson J. that although the testator had directed the sale of his realty and personalty, he not having directed that the proceeds should form a mixed fund, the primary fund out of which the debts, funeral and testamentary expenses, the annuity and the legacies should be paid was the pure personalty, and that the realty was only charged in aid of the pure personalty in so far as it proved insufficient for the payment of all charges except the charitable legacies; and that the charitable legacies lapsed so far the pure personalty proved insufficient. *Caughey* v. *Copeland.*

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THE END.